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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 5

FRANK JAMES LUPPER, ET AL., PETITIONERS,

vs.

ARKANSAS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1963
CERTIORARI GRANTED JUNE 22, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 5

FRANK JAMES LUPPER, ET AL., PETITIONERS,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. A] [File endorsement omitted]

[fol. B]

IN THE
CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS, Plaintiff,

vs.

FRANK JAMES LUPPER, Defendant. No. 59130
THOMAS B. ROBINSON, Defendant. No. 59131

[fol. 1]

APPEAL TRANSCRIPT
IN THE MUNICIPAL COURT OF LITTLE ROCK
CRIMINAL DIVISION

60-2488 and 2506
STATE OF ARKANSAS,
vs.
FRANK JAMES LUPPER.

.....)
) ss.
.....)

On the 21 day of April 1960, before Hon. Quinn Glover, Judge of the Municipal Court of Little Rock, Arkansas, came the defendant Frank James Lupper charged with the offense of Acts 226 and 14 of 1959. Said defendant being then before the court, in custody of the officer, and after hearing the charge entered a plea of not guilty and announced ready for trial, the witnesses were sworn and the court proceeded with the trial. After hearing all the evidence for and against the said defendant, the court found the said defendant guilty as charged and assessed against him fines of $250.00 and $150.00 Dollars, and cost

of $18.00 and 90 days confinement (60 days in #2488 and 30 days in #2506).

Now, on this 21 day of April 1960, within apt time comes the defendant, by his attorney Harold B. Anderson and prays an appeal to the Circuit Court, which is by the Court granted, and the appeal bond fixed at (same as for appearance in municipal court) Dollars, and a copy of the testimony given at said trial ordered attached hereto, which is so attached.

[fol. 2] The defendant having given the required bond with ..... and ..... as sureties thereon, the defendant was ordered released from custody to wait his case on appeal.

I, James L. Verhoeff, Clerk of the Municipal Court of Little Rock, Arkansas, do hereby certify that the foregoing is a true transcript of the record of this Court in the above case.

James L. Verhoeff, Clerk, Criminal Division, Municipal Court.

Endorsed on Back

No. 59130	Fine	$400.00
State of Arkansas,	Act 138	1.00
vs.	State Police	2.00
Frank James Lupper (CM).	Ord. 10,737	
	Court Costs	15.00
Offense	Total	$418.00
Acts 226 and 14 of 1959		
Attorney	Period of Imprisonment	
Harold B. Anderson	90 Days	
Filed	Witnesses	
April 22, 1960 Roger McNair, Circuit Clerk By P. B. Frederick, D.C.	Same as in Cases #2487 and 2505	

[fol. 3]

APPEAL TRANSCRIPT

IN THE MUNICIPAL COURT OF LITTLE ROCK

CRIMINAL DIVISION

60-2487 and 2505

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON.

.....)
) ss.
.....)

On this 21 day of April 1960, before Hon. Quinn Glover, Judge of the Municipal Court of Little Rock, Arkansas, came the Defendant Thomas B. Robinson charged with the offense of Act 226 of 1959, and Act 14 of 1959. Said defendant being then before the court, in custody of the officer, and after hearing the charge entered a plea of not guilty and announced ready for trial, the witnesses were sworn and the court proceeded with the trial. After hearing all the evidence for and against the said defendant, the court found the said defendant guilty as charged and assess against him fines of $250.00 and $150.00 Dollars, and cost of $18.00 and 90 days confinement (60 days in #2487, and 30 days in #2505).

Now, on this 21 day of April 1960, within apt time comes the defendant, by his attorney Harold B. Anderson and prays an appeal to the Circuit Court, which by the Court is granted, and the appeal bond fixed at (same as for appearance in municipal court) Dollars, and a copy of the testimony given at said trial ordered attached hereto, which is so attached.

[fol. 4] The defendant having given the required bond with ..... and ..... as

sureties thereon, the defendant was ordered released from custody to await his case on appeal.

I, James L. Verhoeff, Clerk of the Municipal Court of Little Rock, Arkansas, do hereby certify that the foregoing is a true transcript of the record of this Court in the above case.

James L. Verhoeff, Clerk, Criminal Division, Municipal Court.

Endorsed on Back

No. 59131

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON (CM).

Offense

Acts 226 and 14 of 1959

Attorney

Harold B. Anderson

Filed

April 22, 1960

Roger McNair, Circuit Clerk

By P. B. Frederick, D.C.

Fine	$400.00
Act 138	1.00
State Police	2.00
Ord. 10,737	
Court Costs	15.00
Total	$418.00

Period of Imprisonment

90 days

Witnesses

Capt. Terral, Lt. Talbert, Sgt. Shemwell, Thomas and Owens and Powers LRPD

[fol. 5]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

March Term, 1960

59130

STATE OF ARKANSAS,

vs.

FRANK J. LUPPER (CM).

59131

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON (CM).

ORDER OF CONTINUANCE—May 9, 1960

This day comes the State of Arkansas by Frank Holt, Prosecuting Attorney, and comes the defendants in proper persons and by their attorney, Harold B. Anderson, and defendants are called to the bar of the Court and informed of the nature of the charge filed herein (violation of Acts 226 & 14 of 1959), and each defendant enters his plea of not guilty thereto, and on motion of the defendants the cases are passed to May 31, 1960 for court trials.

[fol. 6]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

March Term, 1960

(Acts 226 and 14 of 1959)

59130

STATE OF ARKANSAS,

vs.

FRANK J. LUPPER (CM).

59131

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON (CM).

ORDER OF CONTINUANCE—May 31, 1960

This day comes the State of Arkansas by Frank Holt, Prosecuting Attorney, and come the defendants in proper persons and by their attorneys, Harold Anderson and Wiley Branton, and on motion of the defendants herein the Court doth pass each case to June 17, 1960 for a jury trial.

[fol. 7]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

No. 59130

No. 59131

[Titles omitted]

MOTION TO DISMISS—Filed June 17, 1960

Come the defendants, and move the Court to dismiss the charge filed herein and for cause state:

1. That they deny that they are guilty of a violation of Act 226.

2. That there is a violation of the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution in that an instrumentality of the State—by judicial enforcement of Act 226 in this action—is being utilized against these defendants to prevent them and all other Negroes from securing equality of treatment by peaceful persuasion.

3. That there is a violation of the due process of law in that an instrumentality of the State seeks to compel the adherence to an arbitrary standard applied to Negro invitees by private establishments by the enforcement of Act 226 in this action, all in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That there is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that the State has made available to pri-
[fol. 8] vate establishments—by the enforcement of Act 226 in this action—the full coercive power of government to aid in the discrimination of Negro invitees because of their race and color.

5. That there is a violation of the Constitution of the United States in that the State is using its criminal statutes to maintain racial segregation and discrimination.

Wiley A. Branton, 119 E. Barraque, Pine Bluff, Arkansas;

Harold B. Anderson, 205 Century Building, Little Rock, Arkansas,

Attorneys for defendants, By Harold B. Anderson.

[File endorsement omitted]

[fol. 9]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

No. 59130

No. 59131

[Titles omitted]

MOTION TO DISMISS—Filed June 17, 1960

Come the defendants, and move the Court to dismiss the charge filed herein and for cause state:

1. That they deny that they are guilty of a violation of Act 14.

2. That there is a violation of the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution in that an instrumentality of the State—by the judicial enforcement of Act 14—is being utilized against these defendants to prevent them and all other Negroes from securing equality of treatment by peaceful persuasion.

3. That there is a violation of due process of law in that an instrumentality of the State seeks to compel the adherence to an arbitrary standard applied to Negro invitees by private establishments by the enforcement of Act 14, all in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That there is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that the State has made available

to private establishments—by the enforcement of Act 14—[fol. 10] the full coercive power of government to aid in the discrimination of Negro invitees because of their race and color.

5. That there is a violation of the Constitution of the United States in that the State is using its criminal statutes to maintain racial segregation and discrimination.

Wiley A. Branton, 119 E. Barraque, Pine Bluff, Arkansas;

Harold B. Anderson, 205 Century Building, Little Rock, Arkansas,

Attorneys for defendants.

By Harold B. Anderson

[File endorsement omitted]

[fol. 11]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

Nos. 59130 & 59131

[Title omitted]

MOTION TO QUASH OR DISMISS INFORMATION—Filed June 17, 1960

Come the defendants and move the Court to Quash the Informations filed herein or to otherwise dismiss the charges contained therein and for cause, state:

(1) That Act 226 of the Acts of 1959 of the sixty-second General Assembly of the State of Arkansas, under which these defendants have been charged with creating a disturbance or breach of the peace, and Act 14 of the Acts of 1959, under which these defendants have been charged with failure to leave the business premises of a store after request of the manager, are each unconstitutional as applied to these defendants for the reason that this prosecution or this attempt of prosecution of these defendants under either of said Acts and under the Informations filed

herein is a denial to these defendants of the equal protection of the laws as guaranteed to him under the Constitution of the United States of America and the Constitution of Arkansas, in that these defendants were singled out because of their race and color from all other parties attempting to receive services at the time and on the occasion of the alleged offenses.

(2) The State of Arkansas, acting through the Prosecuting Attorney of the Sixth Judicial District and the Police Department of the City of Little Rock, Arkansas, [fol. 12] has denied to these defendants the equal protection of the laws of the State of Arkansas and of the United States of America, in that these defendants have been arbitrarily and knowingly discriminated against by the State of Arkansas because of their race and color and by the arbitrary action on the part of the said prosecuting attorney and the Police Department of the City of Little Rock in arresting these defendants while these defendants were in the process of enjoying or attempting to enjoy equal rights with other citizens of Pulaski County, Arkansas. That the action on the part of the State of Arkansas, acting by and through the said prosecuting attorney and the Police Department of the City of Little Rock, Arkansas, is a denial to these defendants of the equal protection of the laws of the State of Arkansas as guaranteed to them by Article 11, Section 3 of the Constitution of Arkansas, and is a denial to them of the privileges and immunities guaranteed by Article 11, Section 18 of the Constitution of Arkansas, and is a denial to them of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America.

(3) That the State of Arkansas, acting through the Prosecuting Attorney of the Sixth Judicial District and the Police Department of the City of Little Rock, Arkansas in prosecuting and attempting to prosecute these defendants under the Informations filed herein, is fostering the private prejudices of Blass Department Store in arresting and prosecuting these defendants solely because they [fol. 13] are members of the Negro race and are of African descent and the same is a denial by the State of Arkansas,

acting through the said prosecuting attorney and the Police Department of the City of Little Rock, Arkansas, of the rights guaranteed to these defendants under Article 11, Section 3 and Section 18 of the Constitution of Arkansas and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States of America.

(4). That the Informations filed herein against these defendants and this prosecution should be dismissed for the same is a denial to these defendants of the equal protection of the laws of the State of Arkansas as guaranteed to them under Article 11, Section 3 and Section 18 of the Constitution of Arkansas, and the same deprives them of their liberty without due process of law and without the equal protection of the laws secured to them by the Fourteenth Amendment to the Constitution of the United States of America solely because of their race and color in that these defendants are members of the Negro race and of African descent and that the Information filed against them and these prosecutions against them are being made solely because of their race and color and these defendants would not now be prosecuted and these Informations would not now be pending against these defendants except for the fact that they are members of the Negro race and are of African descent.

(5) That Act 14 of the Acts of 1959, the statute under which these defendants are charged with failing to leave the premises of another or remaining on the premises of [fol. 14] another after they had been ordered to leave said premises is unconstitutional as applied to these defendants in that it makes it a crime to be on property opened to the public after being asked to leave, because of their race or color, is a violation of the defendants' rights under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America and the equality before the law provisions guaranteed by Article 11, Section 3 of the Constitution of Arkansas and the Privileges and Immunities Clause provided for in Article 11, Section 18 of the Constitution of Arkansas.

(6) That Act 14 and Act 226 of the Acts of 1959 are each violative of Article 11, Section 4 of the Constitution of Arkansas in that they deny the right of these defendants to peaceably assemble for the common good or to petition by remonstrance for a lawful purpose.

(7) That Act 14 and Act 226 of the Acts of 1959 are unconstitutional in that they violate Amendment 13 to the Constitution of the United States of America in that the State of Arkansas, acting through the Prosecuting Attorney of the Sixth Judicial District and the Police Department of Little Rock, Arkansas and also the officials of Blass Department Store, are attempting by the use of said Acts, to force the defendants, solely because of their color, into a position of involuntary servitude by denying to the defendants and all other members of the African or Negro race the right to be served at lunch counters or restaurants on the same basis that other members of the general public are served.

[fol. 15] (8) That Act 14 of the Acts of 1959 is unconstitutional in that it is so vague that it does not prescribe any standard of conduct or circumstances under which the owner or manager of a business shall have the right to request that a person leave the premises of said business and does not apprise the person going upon the said premises of the conduct expected of him to keep from violating the said law or act.

(9) That Act 226 of the Acts of 1959 is written in such a manner that it is impossible for one to determine, and particularly it was impossible for these defendants to determine when, if at any time, they had violated said Act and because of the vagueness, indefiniteness and uncertainty of said Act as applied to these defendants, the arrest and prosecution of these defendants under said vague and uncertain Act is a violation of these defendants' rights under the Due Process Laws of the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, the defendants pray that the Informations filed herein be quashed and that the charges now pending against them be dismissed.

Wiley A. Branton, 119 E. Barraque, Pine Bluff, Arkansas;

Harold B. Anderson, 205 Century Building, Little Rock, Arkansas,

Attorneys for Defendants.

By Wiley A. Branton

[File endorsement omitted]

[fol. 16]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

March Term, 1960

59130

59131

[Titles omitted]

ORDER OVERRULING MOTIONS TO DISMISS—June 17, 1960
VERDICT AND JUDGMENT—June 17, 1960

This day comes the State of Arkansas by Frank Holt, Prosecuting Attorney, and comes the defendants in proper persons and by their attorneys, Harold Anderson and Wiley Branton, and motions to dismiss and quash are filed by the defendants and hearing held and the Court doth overrule said motions, and parties announce ready for trial; thereupon comes twelve qualified electors of Pulaski County, viz: Mrs. Ouida McKissack, N. E. Harpole, Mrs. Herbert Besser, S. N. Arick, Mrs. Joe R. Roberts, Joe Herrick, Mrs. A. C. Salley, W. A. Treadway III, Mrs. Eura J. Smith, Mrs. R. E. Freeman, Mrs. Roy Beard and A. L. Pierce, who are duly selected, empaneled and sworn as a trial Jury in these cases, and after hearing the testimony

of the witnesses, the instructions of the Court and the argument of counsel the Jury doth retire to arrive at a verdict, and after deliberation thereon doth return into open court with the following verdicts: "We, the Jury, find the defendant Frank J. Lupper guilty of violation of Act 226 of 1959, as charged, and fix his punishment at both a fine of *500.00* Dollars and *6 months* imprisonment. Joe Herrick, Foreman."

[fol. 17] "We, the Jury, find the defendant Frank J. Lupper guilty of violation of Act 14 of 1959, as charged, and fix his punishment at both a fine of *500.00* Dollars and *30 days* imprisonment. Joe Herrick, Foreman."

"We, the Jury, find the defendant Thomas B. Robinson guilty of violation of Act 226 of 1959, as charged, and fix his punishment at both a fine of *500.00* Dollars and *6 months* imprisonment. Joe Herrick, Foreman.".

"We, the Jury, find the defendant Thomas B. Robinson guilty of violation of Act 14 of 1959, as charged, and fix his punishment at both a fine of *500.00* Dollars and *30 days* imprisonment. Joe Herrick, Foreman."

Whereupon the Court doth discharge the Jury from these cases and the defendants are given thirty days in which to file a Motion for a New Trial and bond is set at Two Thousand Dollars for each defendant pending filing of motion.

[fol. 18]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

59130

59131

[Titles omitted]

MOTION FOR NEW TRIAL—Filed July 14, 1960

Come the defendants, Frank James Lupper and Thomas B. Robinson, by their attorneys, Harold B. Anderson and Wiley A. Branton, and hereby move the Court to grant a new trial in this case and for cause therefor state:

1. Because the Court erred in overruling the defendants' Motion to Dismiss which was filed prior to the hearing of the evidence over the exceptions of the defendants.

2. The Court erred in overruling defendants' oral motion to declare Act 226 unconstitutional for vagueness.

3. Because the Court erred in overruling defendants' Motion for a directed verdict after the State had rested.

4. Because the Court erred in overruling defendants' Motion for a directed verdict after the State and the defendants had rested.

5. Because the Court erred in giving to the Jury the State's requested Instructions No. 1 and No. 1-A over the objections and exceptions of the defendants.

6. Because the Court erred in giving to the Jury the State's requested Instruction No. 2, over the objections and exceptions of the Defendants.

[fol. 19] 7. Because the Court erred in giving to the Jury the State's requested Instruction No. 3, over the objections and exceptions of the defendants.

8. Because the Court erred in giving to the Jury the State's requested Instruction No. 4, over the objections and exceptions of the defendants.

9. Because the Court erred in refusing to give to the Jury the defendants' requested Instruction No. 3, over the objections and exceptions of the defendants.

10. Because the Court erred in refusing to give to the Jury the defendants' requested Instruction No. 5, over the objections and exceptions of the defendants.

11. Because the verdict was contrary to law.

12. Because the verdict was contrary to the evidence.

13. Because the verdict was contrary to both the law and the evidence.

14. Because the judgment is excessive.

Wherefore, defendants pray that the judgment heretofore entered in this case be vacated and that each of said defendants be granted a new trial.

Respectfully submitted,

Wiley A. Branton, 119 E. Barraque, Pine Bluff, Arkansas.

Harold B. Anderson, 205 Century Building, Little Rock, Arkansas.

By Harold B. Anderson.

[File endorsement omitted]

[fol. 20]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

March Term, 1960

59130

59131

[Titles omitted]

(Act 226 and Act 14 of 1959)

ORDER OVERRULING MOTION FOR NEW TRIAL—
July 14, 1960

This day comes the State of Arkansas by Frank Holt, Prosecuting Attorney, and come the defendants by their attorneys, Harold Anderson and Wiley Branton, and Motion for a New Trial is overruled by the Court and defendants exceptions are saved and appeals are prayed and granted and defendants are given thirty days to file Bill of Exceptions.

[fol. 21]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

BAIL BOND—Filed June 18, 1960

State of Arkansas,
County of Pulaski, ss.

.....)
) ss.
.....)

Frank James Lupper B.M. being in custody, charged with the offense of Violation of Ark. Statutes Act 14 & Act 226 and being permitted to give bail in the sum of Two Thousand Dollars.

Now we, G. Q. Anderson hereby undertake that the above named Frank James Lupper shall appear in the Arkansas Supreme Court, from day to day of its Reguiar Term, 1960, or any term thereafter, to answer to said charge, and shall at all times, render himself amendable to the order and process of said Court, in the prosecution of said charge and that he will not depart therefrom without leave of the Court, and if convicted shall render himself in execution thereof, or if he fails to perform either of these conditions that we will pay to the State of Arkansas the sum of Two Thousand Dollars.

Approved

L. C. Young, Sheriff, Pulaski County, Ark., By A. I. Baker, D.C.

Frank James Lupper, L.S., Anderson Bonding Co.,

By George West, L.S.

G. Q. Anderson and ..... upon their oath say that they are citizens of the State of Arkansas, and worth the sum set opposite their respective names in property situated in said State over and above their just debts, liabilities and exemptions and subject to execution to-wit:

[fol. 22]

Name	Property Personal	Real Estate	Total
East 77 Ft. of Lot 7 Block 227		4000.00	4000.00
City of Little Rock.			
(Located 800 West 8th Street L.R.)			
Aggregate			4000.00

Subscribed and sworn to before me ..... this 17th day of June 1960.

Approved

L. C. Young, Sheriff, Pulaski County, Ark., By A. I. Baker, D.C.

Endorsed on the Back

No. 59130

Bail Bond

STATE OF ARKANSAS,

vs.

FRANK JAMES LUPPER.

G. Q. Anderson

Sureties

[File endorsement omitted]

[fol. 23]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

BAIL BOND—Filed June 18, 1960

State of Arkansas,
County of Pulaski, ss.

.....)
) ss.
.....)

Thomas B. Robinson B. M. being in custody, charged with the offense of Violation of Act 14 & Act 226 and being permitted to give bail in the sum of Two Thousand Dollars.

Now we, G. Q. Anderson hereby undertake that the above named Thomas B. Robinson shall appear in the Arkansas Supreme Court, from day to day of its Regular Term, 1960, or any term thereafter, to answer said charge, and shall at all times, render himself amendable to the order and process of said Court, in the prosecution of said charge and that he will not depart therefrom without leave of the Court, and if convicted shall render himself in execution thereof, or if he fails to perform either of these conditions that we will pay to the State of Arkansas the sum of Two Thousand Dollars.

approved

L. C. Young, Sheriff, Pulaski County, Ark., By A. I. Baker, D.C.

Thomas B. Robinson, L.S., Anderson Bonding Co.,

By George West, L.S.

G. Q. Anderson and ..... upon their oath say that they are citizens of the State of Arkansas, and worth the sum set opposite their respective names in property situated in said State over and above their just debts, liabilities and exemptions and subject to execution, to-wit:

[fol. 24]

Name	Personal Property	Real Estate	Total
East 77 Ft. of Lot 7 Block 227 City of Little Rock		4000.00	4000.00
Aggregate			4000.00

Subscribed and sworn to before me ..... this 17 day of June 1960.

Approved

L. C. Young, Sheriff, Pulaski County, Ark., By A. I. Baker, D.C.

Endorsed on the Back

No. 59131

Bail Bond

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON.

G. Q. Anderson

Sureties

[File endorsement omitted]

[fol. 25]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

No. 59130

STATE OF ARKANSAS,

vs.

FRANK JAMES LUPPER.

No. 59131

STATE OF ARKANSAS,

vs.

THOMAS B. ROBINSON.

BILL OF EXCEPTIONS—June 17, 1960

Be It Remembered that on this 17th day of June, 1960, the same being a day of the regular March, 1960, term of the Pulaski Circuit Court, First Division, Before the Honorable William J. Kirby, Judge of said Court, and a Jury, this cause came on to be heard, the State of Arkansas being represented by the Hon. Frank Holt, and the defendants being represented by Hon. Wiley Branton and Hon. Harold Anderson, and both parties announcing ready, thereupon, the following proceedings were had and done, objections made, exceptions saved, etc., to-wit:

COLLOQUY BETWEEN COURT AND COUNSEL RE MOTIONS TO DISMISS, AND MOTION TO QUASH, AND RULING THEREON

Mr. Anderson: Your Honor, we would like—we have some motions we would like to enter.

The Court: Sir?

[fol. 26] Mr. Anderson: We have some motions we would like to enter.

The Court: The Court will dispose of them. Do you want to argue the motions?

Mr. Branton: Well, if there's going to be some discussion, it ought to be in chambers.

The Court: Excuse me, ladies and gentlemen, we have some motions we want to decide. We will retire to chambers.

(Thereupon, the Court and Counsel retired to chambers and thereafter occurred the following proceedings.)

The Court: Have you got your motions, Counselor?

Mr. Anderson: Yes, sir, just a moment.

The Court: Did you furnish the State a copy?

Mr. Anderson: Yes, sir.

The Court: Have they been filed yet?

Mr. Anderson: No, sir, they haven't been.

The Court: Have the Clerk mark them filed.

Mr. Branton: These have not been filed with the Clerk, Your Honor.

The Court: All right. Mark them filed, Mr. Clerk. Now, let's see. I have got two motion to dismiss and a motion to quash.

Mr. Branton: Now, Judge, these two motions right [fol. 27] here, in order to save time and in fairness to the Court and Counsel, these motions are identical to the two motions or rather to one of the motions which was filed in the case which was tried about two weeks ago, the only difference between them is that one of them refers to Act 14 specifically and the other one refers specifically to Act 226.

The Court: Act 226, yes.

Mr. Branton: But the sense of the motions is pretty much word for word like the motions which we previously submitted to the Court.

The Court: All right.

Mr. Branton: I say that because the Court has seen them. He is familiar with them and I don't think we raise anything new in these particular motions.

The Court: All right. Let the motion to dismiss in Case No. 59130 and 59131, Lupper and Robinson, and the motion to dismiss in the same cases as to Act 226 and as to Act 14, both be overruled. Save his exceptions. Now, you want to argue this motion to quash?

Mr. Branton: Now, the other motion to quash or dismiss has not previously been submitted to the Court in any [fol. 28] form that I am aware of.

The Court: All right. Let me read it.

Mr. Branton: It is rather lengthy. It has nine separate paragraphs, each one being a separate motion.

The Court: You want to argue the motion?

Mr. Branton: If Your Honor please.

The Court: You may remain seated.

Mr. Branton: All right, sir. We feel that Act 226 is clearly unconstitutional as applied not only to the Arkansas Law but to the Federal Constitution. The Statute sets out a certain line of conduct that leaves any person doubtful as to exactly what standard of conduct he can or cannot conform to and still not be guilty of a violation of this law.

Now, Act 226 is the disturbing the peace act.

Mr. Anderson: Yes.

Mr. Branton: We think that in the way it is worded that it is just unconstitutional on its face, that it is impossible to set a standard of conduct that one could conform to and that as such it is unconstitutional on its face for vagueness [fol. 29] and indefiniteness and in addition to that we charge that the Act is being used to accomplish an unlawful purpose, that it is being used in a discriminatory manner, that the defendants in this case are negroes or persons of African descent and that the Act is being used to deny to these defendants and any other negroes similarly situation the right of equality of opportunity, equality before the law. It denies to them the right to petition and other guarantees which are set out, not only in our State Constitution but in the Federal Constitution and on those grounds as to Act 226 we say that that act is unconstitutional. As to Act 14, the failure to leave after being requested to do so, we say that that Act is entirely too vague and is unconstitutional on its face. It does not set up any standard of reason which might be advanced for allowing a manager to refuse service to any one. In other words, obviously a person could come into a store under this Statute and decide that they wanted to make a purchase, pay some money over to the manager or to the clerk, the clerk would refuse to give them any goods for any money [fol. 30] and the person could say, "If you are not going

to give me the goods," the manager could say, "You get out of here," and under the Act that person, if they refuse to leave, even though they had paid money, it leaves it open there for the manager of that store to have that person arrested under this and exempts the store from liability for arrest for doing so. It sets up no reasonable requirements for leaving the store. It just says any person who refuses to leave. It doesn't say within any certain length of time. It sets no standards for departure or anything else and this being a criminal statute, it ought to be a little more specific than that.

In addition to that argument about the unconstitutionality on its face, we raise the same argument that we do as to Act 226 and again Act 14 is being used in a normal manner to discriminate against the defendants solely because of their color.

Mr. Holt: If the Court please, the State takes the same position it has in other cases where similar motions have [fol. 31] been filed and briefly it is that the Acts are not discriminatory in the wording nor in its application and it is the Acts are a valid exercise of the police power of the State.

The Court: I am going to overrule the motions. Save the exceptions.

Mr. Branton: All right, sir.

(Thereupon, the Court and Counsel returned to the Court Room, and thereupon the Jury Panel was called and sworn and thereafter occurred the following proceedings.)

The Court: Is the State ready?

Mr. Holt: Yes, sir.

The Court: Is the defense ready?

Mr. Anderson: Yes, sir.

The Court: Ladies and gentlemen, we have Frank Lupper and Thomas Robinson here as defendants. Will you gentlemen stand up please and let the Jury see you. You may sit down. Mr. Wiley Branton here on their immediate right and Mr. Harold Anderson are going to defend. Of course, you all know Attorney General Holt and his assistant, Mr. Horton. These parties are charged with violating two Acts. I am not too familiar with them. I will read

[fol. 32] them to you all and let you understand the charge, that is, I will read the pertinent portions of them to you. I don't know whether I want to read the whole Act or not, but they are charged with violation of Act 14 of 1959, which has this title: "An Act to Render it Unlawful for any person to refuse to leave the business premises of any person when so requested by the order or manager thereof; to render it unlawful for any person, firm, association, corporation or other organization to aid, encourage, counsel or assist any person or persons to do any act in violation of the provisions of this Act; to authorize the removal of any person refusing to leave the premises at the request of the owner or manager of such premises; to provide penalties for violations of this Act; and for other purposes."

The Section of the Act I assume is Section 1, I imagine they are charged under. Let me see. It just says Act 14. Anyway, after the preamble where the reporter whereases a couple of times, Section 1 reads as follows:

"Any person who after having entered the business premises of any other person, firm, or corporation, other [fol. 33] than a common carrier and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty ($50.00) Dollars, nor more than five hundred ($500.) Dollars, or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

As I understand it now, that is the section under—Section 1 of Act 14, under which these parties are charged is that right?

Mr. Holt: Yes, sir.

The Court: All right. Now, let me get Section 226. Now, of course, that is not all of Act 14. It has six or seven other sections, but I think that is the pertinent section and I just want to read to you the pertinent sections so you will know something about this when I ask you if you know any reason why you can't sit on this case. That is the only purpose.

"An Act to prohibit any person from creating a disturbance for breach of the peace in any public place of business and to prescribe the penalty therefor."

[fol. 34] And it reads, Section 1, as follows:

"Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any public place whatsoever in the State of Arkansas and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace of threatened breach of the peace shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred ($500) dollars, or imprisoned in jail not more than six months, or both such fine and imprisonment."

(Thereupon, a drawn and struck jury was selected and opening statements were made by Counsel and thereafter occurred the following proceedings.)

The Court: Call your first witness, Mr. Holt.

Thereupon, PAUL TERRELL, called as a witness on behalf of the State, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

[fol. 35] Direct Examination.

By Mr. Holt:

Q. State your name, please?
A. Captain Paul Terrell, Little Rock Police Department.
Q. How long have you been an officer there?
A. Nineteen years.
Q. Captain, on April 13, 1960, did you have occasion to make an investigation of an alleged offense at Blasses Department Store in Little Rock, Arkansas?
A. I did.
Q. Do you recall what you—caused you to be there and what you observed?
A. We, Lieutenant Talbert and myself, Officer Baer, and Officer Thomas, we were at 4th and Main Streets in front of the Worthen Bank. We were at the corner of 4th and

Main, over in front of the Worthen Bank Building. It's about twelve noon. Mr. Holt and Mr. Trianfonte, I believe is the way he pronounces his name, Trianfonte or something like that, but anyway they come over and identified themselves as being the manager and assistant manager of Blass' Department Store, said they had some colored boys.

Mr. Branton: I object to what was said.

[fol. 36] The Court: Just tell what you did, Mr. Terrell, after you had this conversation with them.

The Witness: They asked us if we would assist them. We went over to Blass' Department Store and when we got inside the store, just about 20 feet from the elevator we observed two negro boys that they poiated out to us and said they were the ones that had sat—

Mr. Branton: I object unless this was done in the presence and hearing of the defendants, Your Honor.

The Court: Was it in the presence and hearing of the defendants, Mr. Terrell?

The Witness: It was.

The Court: All right, proceed.

The Witness: They pointed out these two boys, said they were the ones that—Thomas B. Robinson and Frank James Lupper.

By Mr. Holt:

Q. Are they present in the Court Room today?

A. They are.

Q. All right. Go ahead.

A. They said they were the ones that had—I asked them, or they said they were the ones that had been in their lunch counter and sat down. I asked Robinson in the presence [fol. 37] of all of us, Lieutenant Talbert and myself, Mr. Trianfonte and Holt, if they were the ones that was at the lunch counter. Robinson spoke up and said he was. Also Lupper said he was also present and we arrested them, brought them both to headquarters. Actually their statement was made in the presence of Lieutenant Talbert and myself, Mr. Holt.

Q. Where is the lunch counter there, do you know?

A. It is up on the mezzanine floor, the second floor.

Q. And this conversation in their presence and with the —was where in the store?

A. Directly underneath the lunch counter.

Q. Did they state to you that they had sat at the lunch counter?

A. They did.

Q. Did they state to you that they had been asked to leave?

A. They did.

Q. Did they state to you that they had refused to leave?

A. Yes, sir.

Q. Would you be able to tell this Court and Jury the demeanor of the patrons in the store at the time you were talking to them or do you know?

A. As far as the lunch counter, I couldn't say, but there were several white people that followed them and ganged up around us while we were talking to them. There was quite a few people there. I would say 25 or 30 people.

[fol. 38] Q. Did you find it necessary to restrain any one or not while they were—you were talking to them?

A. There was several people walked up there and asked what we were going to do, wanted to know what was going on, you know, and so forth. They asked several questions.

Mr. Holt: Your witness.

Cross examination.

By Mr. Anderson:

Q. Officer Terrell, you were in Municipal Court when this case was tried is that correct?

A. Yes, sir.

Q. And in that case you didn't testify to any of that that you said here, did you?

A. I am sure I did.

Q. Did you say that they had ganged up, that anybody had to be restrained?

A. I don't remember just what I did testify there.

Q. Then who was with you, Lieutenant Terrell?

A. Lieutenant Talbert.

Q. Now, as far as you observed, these boys weren't doing anything, were they, when you were talking to them? They were orderly?

A. They were coming out of the store. I mean—

[fol.39] Q. But they were orderly?

A. As far as—yes.

Q. Except for what the manager had said to you, you had no reason to arrest them, is that correct?

A. Except from the complaint of the manager.

Q. And did he request you to arrest them?

A. He did. He had requested our assistance to get them out from the lunch counter when he come over to get us.

Q. But they weren't at the lunch counter, were they?

A. He told us that he had two boys that had refused to leave the lunch counter and asked that we assist them.

Q. But you don't know that they did any of these things, did you?

A. I do not except their word. They said they had been up there and they had been asked to leave and refused to leave.

Q. Was Officer Talbert standing near you, very near?

A. I am sure he was.

Q. He was close enough to have heard it?

A. I think—yes, he was.

Q. Then he could have heard what you heard, is that correct?

A. I would think so.

Q. Well, there is no reason why he couldn't have heard, is that correct?

A. Well, I couldn't say whether he could hear exactly [fol. 40] what I did. I was talking to them. Maybe he was talking to some of them. I couldn't say just exactly what he heard and what he didn't.

Q. Now, you talked to both boys?

A. Yes, I asked both of them had they been at the lunch counter and they said they had.

Q. You asked each one individually?

A. That is right.

Q. Now, are you positive that you asked them if they refused to leave?

A. I asked them were they the ones at the lunch counter and had Mr. Holt asked them to leave. They said yes, that they wanted to be served.

Q. But I am saying are you positive that they told you that they refused to leave?

A. They said they had been asked to leave.

Q. And that is all?

A. (No response.)

Mr. Branton: Get his answer in the record. The nod of his head doesn't help the record any.

The Witness: Do what?

By Mr. Anderson:

Q. Instead of answering you nodded your head to the question.

A. Nod your head?

[fol. 41] Q. Is that right?

A. Now, ask the question again.

Mr. Anderson: Read the question, Mr. Reporter.

(Question read.)

The Witness: I answered the question, I believe, by saying that they had been asked to leave.

Mr. Anderson: There was another question, I believe, there, wasn't there?

The Court: Well, ask him the question again and let him answer it.

By Mr. Anderson:

Q. The thing that they told you was that they had been asked to leave?

A. They did.

Redirect examination.

By Mr. Holt:

Q. What time of day was this, Captain?

A. It was twelve, twelve noon.

Q. Was there a large or small crowd in the store?

A. There was a large crowd. I believe there was something, I forget what it was, but anyway there was a large crowd downtown that day.

Mr. Holt: No further questions.

The Court: Both of you gentlemen through with this [fol. 42] witness?

Mr. Holt: Yes, sir.

Recross examination.

By Mr. Anderson:

Q. Did the defendants seem to be leaving the store when you met them, is that correct?

A. No, I didn't say they were leaving the store. I might have said, but they were leaving towards the elevator. They were about halfway from here to you or maybe a little further from the elevator, but the elevator is in the center of the store.

Q. In which direction were they going?

A. They were—there was a large crowd in there. They were coming from the elevator which would have been going south from the elevator.

Q. Going toward the south entrance?

A. I couldn't say. There is an aisleway there. They could—I couldn't say that they were going out of the store.

Q. But they were going out of the door there or some other department in the store?

A. There were several aisles there. They could have been going any direction.

Mr. Anderson: That is all.

[fol. 43] The Court: Either one of your gentlemen want the Captain any further?

Mr. Anderson: No, I don't think so. No, sir.

The Court: You may be excused.

(Witness excused.)

The Court: Call your next witness.

Thereupon, H. J. TALBERT, called as a witness on behalf of the State, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Holt:

Q. State your name, please.
A. H. J. Talbert.
Q. And where do you work?
A. Little Rock Police Department.
Q. How long have you been a police officer?
A. Eighteen years.
Q. You assist in the investigation at Blass' Department Store in Little Rock on April 13th?
A. Yes, sir, I did.
Q. How, what attracted your attention?
A. Two men come running across the street on the corner [fol. 44] in front of the Forthen Bank.
Q. Do you know who those men were?
A. They told us they were managers of the department store.
Q. All right. And don't tell what they told you, but based on your information, what did you do?
A. Went in the store.
Q. And who went with you, Officer?
A. Captain Terrell.
Q. And what did you observe when you got in there?
A. I observed two negroes coming down the aisle in the store, was pointed out to me.
Q. Were the two men who complained with you at that time?
A. They was.
Q. Do you see those two in the court room today who were pointed out to you, the two defendants?
A. These two boys on my right.
Q. Do you recall their names?
A. No, sir, I don't. We had had 12 or 15 that day.
Q. Now, on what floor of the store was it that you—
A. The ground floor.

Q. And did you or Captain Terrell or anyone talk to the boys at that time?

A. We both talked to them.

[fol. 45] Q. Was anything asked by them about why they were there?

A. I asked the big boy there if he had been sitting at the lunch counter and he said he did.

Q. Did you ask him if he was asked to leave?

A. I did.

Q. What did he say?

A. He said that he was.

Q. What did he say, he left?

A. He said he refused.

Q. Did you question the other one as to whether he had refused to leave or not?

A. I did not.

Q. Did you know about what time of day it was?

A. It was between 11:45 and 12:00 o'clock.

Q. Was there a small or large number of people in the store?

A. There was, I would say, over a normal crowd, a large crowd of people.

Q. Officer, could you say from your experience as an officer what the demeanor of the patrons of the store were and was it noticeable?

A. I didn't notice it in that store at that time.

Mr. Holt: Your witness.

[fol. 46] Cross examination.

By Mr. Anderson:

Q. Now, Officer Talbert, you were present in the Municipal Court, is that correct?

A. I was.

Q. Now, I will ask you if you didn't testify to this in Municipal Court:

"Answer: Captain Terrell talked to the boys and asked them if they were at the lunch counter. They said they

were. He asked them if they refused to leave and one of them said he did."

That was your answer in the Municipal Court.

"Question: Did the other one deny it," was the question asked of you.

"Answer: The other one denied it to me." That was your answer in Municipal Court.

"Question: Do you know which one it was," is the question following and you answered:

"Answer: This one here said he refused to leave.

"Question: Is that Lupper or Robinson?

"Answer: I believe this is the one, this is Robinson.

"Question: Go ahead.

"Answer: This big boy, Lupper, he reared up and pointed his finger at Mr. Holt and said he didn't refuse [fol. 47] to leave. We put them under arrest and took them out of the store."

Now, that was your testimony in Municipal Court, wasn't it?

A. I think so. I don't remember.

Q. Well, then why did you change it here this morning?

A. Because I testified to what I done.

Q. You testified now that both of these boys told you that, didn't you?

A. No, sir, I did not.

Q. That is not your testimony this morning?

A. No.

Q. Then you are saying—

A. That one of them.

Q. That Robinson said he refused?

A. That one of them is the one I talked to.

Q. That is right. You were standing next to—

A. We was altogether.

Q. You were next to Captain Terrell?

A. We was all, the two men, the two negroes and Captain Terrell was all standing in one bunch.

Q. That is right. And you could hear what was going on and what was said?

A. That is right. That is right.

[fol. 48] Q. And this boy said in this group he did not refuse to leave? He denied it?

A. This big boy is the one that said he refused to leave.

Q. But he did say that in the presence of Captain Terrell?

A. Yes, we was all standing there together, the two store managers.

Q. Now, I believe it was also your testimony there in the Court that as far as you knew and from what you observed these boys had done nothing for you to arrest them, is that correct?

A. Only on what the men said.

Q. Just what the manager said?

A. That is right. That is right.

Q. In other words, their conduct was all right? It was orderly and well behaved?

A. They was coming down the aisle when we stopped them.

Q. Yes, weren't bothering anybody or weren't molesting anybody?

A. That is right.

Q. Weren't loud and boisterous?

A. No.

Q. In other words, their conduct wasn't threatening to disturb the peace in any manner, was it?

A. Not when we stopped them, no.

Mr. Anderson: That is all.

[fol. 49] Redirect examination.

By Mr. Holt:

Q. Which one, Officer, told you if you can identify him that he sat at the lunch counter and refused to leave?

A. The big fat man on this end.

Mr. Holt: All right. No further questions.

The Court: You may be excused, Lieutenant.

(Witness excused.)

Thereupon, A. F. Baer, called as a witness on behalf of the State, after having been first duly sworn by the State, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Holt:

Q. State your name, please?
A. A. F. Baer.
Q. Where do you live?
A. 711 Maple, North Little Rock.
Q. Where do you work?
A. Little Rock Police Department.
Q. What is your rank?
A. Sir?
Q. Your rank?
[fol. 50] A. Patrolman.
Q. How long have you worked there?
A. Four and a half years.
Q. Officer, did you have occasion on April 13, 1960, with other officers to make an investigation of an alleged offense at Blass' Department Store in Little Rock?
A. Yes, sir.
Q. Who all, Officer, did you work with?
A. I was with Lieutenant Talbert and Captain Terrell.
Q. Where were you when you received information to go there?
A. I was working that beat at the particular time.
Q. What did you observe on that date?
A. I observed that there was a group of negroes that proceeded in the store that—some went in the front door and some went in the Fourth Street side and I knew that they were these sit-downers they have been called because most of them had their badges on and I followed them in and observed them sitting down upstairs.

Mr. Branton: If Your Honor please, I object to this testimony unless it can be shown that these defendants were a part of any group that the witness saw go in.
The Court: Objection sustained.

[fol. 51] By Mr. Holt:

Q. Can you?

A. Robinson was in the group of negroes. I had seen him once or twice before.

The Court: You knew him, did you, enough to recognize him?

The Witness: I had come to recognize him, yes, sir.

The Court: All right. Proceed.

The Witness: On account of his glasses and his build.

The Court: Which one is Robinson?

The Witness: He is the heavy set one on the right.

The Court: I see. All right.

The Witness: I proceeded down and called headquarters and advised them.

Mr. Branton: I object to what he advised headquarters.

The Court: Don't tell us what you told somebody. Just tell us what you did.

The Witness: Well, I called headquarters.

The Court: All right. Now, then what happened? Don't give conversation.

The Witness: And they said—

The Court: That is what we are trying to get at.

The Witness: They sent the Lieutenant and the Captain down there, talked to Mr. Trianfonte of the Blass store. [fol. 52] He advised us of the situation there.

The Court: Don't tell what he advised you. Just what did you do after you got the information?

The Witness: We went into the store, walked up to Lupper and Robinson. They admitted to us that they had been upstairs and sat down and that they were the two that had refused to leave.

By Mr. Holt:

Q. So where did you—where were you when you observed these two defendants in the store? In what part of the store did you first see them?

A. I was upstairs.

Q. Did you see—

A. In the eating place, the lunch counter, whatever it is called.

Q. How many were sitting there or sat down there?

A. I would say between 12, 15, maybe more. I am not sure.

Q. Were you present when any person working for the store approached and conversed with them?

A. No, sir, I wasn't.

Q. Did you observe any of them leave or not?

A. When I came back outside from using the phone and the wagon had driven up and several police cars, they were beginning to come out.

Q. Did you talk to any of them while they were sitting at [fol. 53] the lunch counter yourself?

A. No, sir.

Q. Did you hear anyone talk to them?

A. I talked to the store employee. I don't know his name and he advised he was waiting for the manager at the time.

Q. Well, don't say what he said. Did you have a conversation with Lupper or Robinson either during your investigation? Did you talk to the defendants?

A. No, sir, other than advised them they were under arrest after the Lieutenant and Captain was talking. We were all three together there at the same time.

Q. Did they refuse to leave at your request or anybody else's from your own personal knowledge?

A. Trianfonte.

Q. No, not what he told you, in other words.

The Court: Were you there when anybody requested them to leave is what he is trying to get at.

Mr. Holt: Yes, sir.

The Witness: No, sir, not when they requested them to leave. They advised us.

The Court: Well, that is what he wants.

The Witness: We asked them and they advised us that they were to—

Mr. Branton. I object to that.

[fol. 54] By Mr. Holt:

Q. No, only your conversation with the defendants or in their presence.

A. They didn't, no, sir.

Q. You didn't have a conversation with them?

A. Personally.

Q. All right.

The Court: Were you present when the Lieutenant and the Captain had any conversation with them?

The Witness: Yes, sir.

The Court: Now, if you want to ask what they said, ask him what they said.

By Mr. Holt:

Q. Were you present when the other officers questioned them?

A. Yes, sir.

Q. Did they admit or deny either or both of them that they were at the lunch counter?

A. They both admitted that they were, had been up to the lunch counter and they were asked then if they had refused to leave and they both said that they had.

Mr. Holt: Your witness.

[fol. 55] Cross examination.

By Mr. Branton:

Q. Officer Baer, have you ever testified previously in this case in Municipal Court?

A. No, sir.

Q. Now, where were you when Captain Terrell and is it Lieutenant Talbert?

A. Yes, sir.

Q. Lieutenant Talbert first made contact with the defendants?

A. I was standing—we were all five right to—well, there was six of us counting the employees standing there, plus there's quite a crowd of people there. We were altogether.

Q. And where was this in the store?

A. Oh, Judge, maybe 25 foot from the elevator, maybe a little farther than that. It was kind of in the middle of the main floor.

Q. Was this on the first floor?

A. Yes, sir.

Q. Did it appear that the defendants were in the act of leaving the store when they were stopped by your group?

A. As near as I can recall, I believe they were just standing there when we walked up to them. They were still just —they were just standing at the—there was some going and coming. These two happened to be just standing there, [fol. 56] I believe.

Q. Now, are you sure about that?

A. As near as I can recall I believe they were: I am not positive though.

Q. You are not postive about that?

A. They could have been moving toward the door. I am not sure.

Q. Now, are you positive that both of these defendants admitted that they had refused to leave?

A. Yes, sir, they asked each one as near as I recall.

Q. Now, were you there in the presence of Captain Terrell and Officer Talbert?

A. Yes.

Q. Did you hear everything that was said to the defendants?

A. Yes, I was standing right there at their elbow.

Q. Now, if I tell you that one of the witnesses who just preceded you has stated that one of these defendants denied that he refused to leave, can you explain the inconsistency of his statement and yours?

A. No, sir.

Q. Are you positive about your testimony?

A. Yes

Q. And you say that both defendants admitted that they [fol. 57] refused to leave?

A. Yes, sir.

Mr. Branton: That is all.

Mr. Holt: No further questions.

The Court: Do either one of you gentlemen want the officer any further? You are free to leave.

(Witness excused.)

Thereupon, JOSEPH TRIANFONTE, called as a witness on behalf of the State, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Holt:

Q. State your name, please?
A. Joseph Trianfonte.
Q. How do you spell that name, please?
A. T-R-I-A-N-F-O-N-T-E.
Q. And where do you work, Mr. Trianfonte?
A. Assistant Store Superintendent at the Blass Company.
Q. And how long have you been there?
A. I have been there approximately about four and a half years.
Q. You were in a supervisory capacity?
A. Yes, sir.
[fol. 58] Q. And did you have anything to do with the lunch counter?
A. More or less, it's under the supervision of the store superintendent or his assistant when the store superintendent is not there.

The Court: Can you ladies and gentlemen hear the witness? Talk just a little louder so all the jury can hear you over there.
The Witness: All right.
The Court: They have got to hear you too.

By Mr. Holt:

Q. You do have some supervisory power over the lunch counter yourself?
A. Yes, sir.
Q. And what other person has?
A. The store superintendent and we have a luncheon manager.
Q. Yes, sir. Does Mr. Holt have any authority there?
A. Yes, sir, complete.
Q. Complete. Now, on April 13, 1960, were you in the store?

A. Yes, sir.

Q. Did anything occur there to attract your attention?

A. Well, I was sitting in my office and I received a call that we had guests up in the dining room.

Q. And what floor is your office on?

[fol. 59] A. My office is in the basement.

Q. And where is your dining—your lunch counter?

A. It is on the mezzanine, the main part of the store.

Q. And what floor is that?

A. That is on the mezzanine, the floor above the first floor.

Q. All right. And based on your information, did you go up there?

A. Yes, sir, I did.

Q. And what did you observe?

A. I observed a group of these boys, students sitting at the lunch counter, also at scattered tables in the forepart of the lunch room.

Q. Were they wearing any sort of sign on themselves?

A. No, sir, they were very neatly dressed.

Q. Did they—about how many were sitting at the lunch counter, would you say?

A. Oh, I would say approximately six or seven. I didn't count them.

Q. And how many were sitting at tables?

A. Well, I would say about three.

Q. And what did you do?

A. Well, I went up to one boy. It isn't any of these boys here. Well, I suggested that we are not prepared to serve you at this time and will you kindly excuse yourself and [fol. 60] he did not leave. He insisted that every Blass customer must be satisfied.

Q. Is that your slogan?

A. That is our slogan and we try to live up to it.

Q. So what did you do?

Mr. Branton: If Your Honor please, I am not clear on one point. Is he saying that one of the defendants—

Mr. Holt: No, he said that it wasn't one of them, that there was a group.

Mr. Branton: Will you ask the witness to confine his remarks to what he did with these defendants, please?

Mr. Holt: We think it is proper.

Mr. Branton: If Your Honor please, these statements which the witness said to somebody else, unless it is shown that it was in the presence of these defendants, is not admissible and we object to it on that ground.

Mr. Holt: I will withdraw the question. He is correct.

By Mr. Holt:

Q. Was this conversation with this other boy in the presence of the two defendants, or do you know?

A. I couldn't say. This boy came in late, the big boy here (indicating).

[fol. 61] Q. All right. So you observed these numbers there and where they were sitting? Now, did you have a conversation? What did you observe about the two defendants?

A. I don't know this boy's name here, the smaller of the two. I don't recall him, but the other fellow here, I recall when he came in.

Q. Well, describe what you recall.

A. I did not speak to either of these two boys.

Q. You did not?

A. No, sir.

Q. Did you see either or both of these two defendants in the store?

A. No.

Q. Which one did you see?

A. Well, this fellow here on the outside.

Q. The smaller or larger one?

A. The larger boy.

Q. All right. What did you see him do?

A. Well, he just came up to the counter and sat down and went into conversation with the other group of boys.

Q. Did you discuss anything with him yourself?

A. No, sir.

Q. Did anyone else come in and assist you?

[fol. 62] A. No. Mr. Holt was speaking to one group of boys.

Q. And what was your actions whenever—after your conversation with him?

A. Well, I spoke to—I got up from one counter to the table and requested the boys to leave.

Q. Let's confine it to these two defendants. The one you recognized, can you say that you requested this defendant whom you recognize to leave?

A. No, sir.

Q. You did not request him?

A. No.

Q. You didn't talk to him?

A. No, sir.

Q. Do you know why he came in late?

A. No, sir.

Q. Then after you—what did you do?

A. Well, I—after speaking to the boys individually and again I requested them to leave, they refused, so we just turned around and went out and spoke to Mr. Holt.

Q. Well, don't say what you talked to him about.

A. No, I didn't say anything.

Q. Just say what you did.

A. What I did. I went out and just went on the corner and I went over there and notified the police that I had [fol. 63] guests that would not leave.

Q. Did the police come with you?

A. They preceded me, yes, sir.

Q. Did you observe anything else after you got back in the store with the police?

A. No, sir, I went in one door. I went in at the main street door. The police went in the Fourth Street door and I noticed that they stopped some boys and I don't know who they were.

Q. I see. That is all?

A. That is all.

Mr. Holt: Your witness.

Mr. Anderson: No questions, Your Honor.

The Court: You are excused.

(Witness excused.)

Thereupon, HENRY L. HOLT, called as a witness on behalf of the State, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Holt:

Q. State your name, please?
A. Henry L. Holt.
[fol. 64] Q. And where do you live?
A. 6115 West Markham.
Q. And where do you work?
A. At the Blass store.
Q. And how long have you worked there?
A. I worked there since last November.
Q. And where are you from?
A. Chicago.
Q. I was trying to see whether we were related or not.
A. If so, I didn't know.

The Court: If you have got a poll tax receipt, he will claim kin to you.

By Mr. Holt:

Q. Mr. Holt, what is your position with the store?
A. I am store manager.
Q. And were you such on April 13, 1960?
A. I was.
Q. Were you in the store at that time?
A. I was.
Q. Is the Blass Department Store owned through private capital or who—does the Government have any interest in it?
A. It is my understanding it is a private corporation.
Q. All right. I will ask you if anything happened to attract your attention and you went and asked for assistance [fol. 65] from the police?
A. Yes.
Q. Will you, in your own words, describe, if you recall, what happened there and, first of all, I want to ask you if you have supervisory and manager's powers of the store?

A. That is right.

Q. Does that include the lunch counter?

A. That is right.

Q. And so would you then tell the Court and Jury what you actually observed and not what someone told you now?

A. I went to the balcony lunch room during the lunch hour and observed there were five negro boys sitting in the lunch room, three of them at the counter and two of them at tables. I told each one of them in turn that I didn't want any disturbance, but I did ask them to leave. They didn't want to leave, refused to leave and wanted to argue with me about whether they should leave and I refused to argue with them and just told them.

Mr. Anderson: Your Honor, we are going to object to that. Are you testifying as to these defendants? Is he testifying as to these defendants?

By Mr. Holt:

Q. Let me ask you now of the five you observed, do you [fol. 66] see any of them in the court room today?

A. Yes.

Q. Are these—do you recognize these two defendants?

A. I do.

The Court: Proceed.

By Mr. Holt:

Q. Well, go ahead.

A. Then after asking them to leave and their refusing to leave, I left the store to look for assistance and having them removed.

Q. Where did you go to find the—

A. I went across the street, diagonally across the street in front of the Worthen Bank and found a police officer and told him that I had asked these people to leave and they had refused to do so and he came back with me and found them still there.

Q. Did you observe these two defendants anywhere in the store when you came back?

A. Yes, they were in the store when I came back.

Q. Did you observe Captain Terrell and Lieutenant Talbert talking to them?

A. Yes, he accompanied me back, as a matter of fact.

Q. All right. Did you identify them then?

A. Yes, I did.

[fol. 67] Q. And you did ask these two defendants whom you recognized as being two of five to leave and they refused to do it?

A. I did. That is correct.

Q. About how long would you say you were gone from when you left to go get the officers until you came back, how many minutes would you say approximately?

A. Oh, two or three minutes, I guess, perhaps five. No more than that.

Q. What time of day was this, Mr. Holt? About what time?

A. It was in the lunch period. I would say somewhere between 11:30 and 12:00 roughly. I am not sure of the exact time it was.

Q. What is your busiest hour or time of day in that store, would you say?

A. From eleven to two.

Q. Was your crowd, could you tell what the demeanor of the crowd was while this was going on? Was it—did it attract it generally?

A. Well, there were a number of people in the tea room when I arrived there who were all of them apparently very interested perhaps, concerned with what was going on and what would happen.

Q. Did it cause any disruption in the trade or sales up there?

A. Well, during the time that I was there talking to them [fol. 68] and asked them to leave no one came in the tea room. Normally I would have expected a good many people.

Q. And that is your busiest time?

A. Yes, it is, sir.

Mr. Holt: Your witness.

Cross examination.

By Mr. Anderson:

Q. Mr. Holt, were these boys orderly?
A. They were quiet.
Q. They weren't boisterous?
A. No, they were not boisterous at all.
Q. And not disrespectful?
A. No.
Q. Now, are you sure that you talked to these two defendants here?
A. Yes, I did.
Q. A moment ago, Mr. Trianfonte I believe is his name, stated that one of these boys wasn't in the lunch room when you were there. How do you reconcile that statement?

Mr. Holt: Your Honor, I don't believe that is a proper question. I don't believe he said that.

Mr. Anderson: I think he did, Your Honor.

The Court: The record should show that. You may read the record and see.

[fol. 69] (The record was read.)

The Court: Now, ask the question.

By Mr. Anderson:

Q. Mr. Trianfonte called you, is that correct?
A. I beg your pardon?
Q. Mr. Trianfonte called you?
A. It might have been Mr. Trianfonte. I got the phone call. I don't recall who it was that phoned.
Q. And then did Mr. Trianfonte state to you that these boys were sitting in the—
A. The phone call informed me that the boys were sitting in the restaurant; that is right.
Q. And when you were there, how many did you see? How many did you say were sitting there?
A. Five.
Q. And they were sitting there when you came into the room?
A. That is right.

Q. Did you see another one enter the room?

A. No, I didn't see another one enter the room.

Q. Were you in a position where you could have observed it?

A. No, they were on my right when I went down the row taking each one in turn and asked him to leave and after I had finished the conversation with each of the boys that [fol. 70] were at the counter I turned and there were several boys at the tables and I talked to them. Now, I can't say what was going on behind my back.

Q. So you can't say whether or not Robinson came in afterward?

A. I don't know the boys by name.

Q. Well, that is the large fellow.

A. I can't say whether I saw him come in the tea room, no, but I did see him in the store.

Q. I think—

A. I saw him in the store when I came back with the police officers.

Q. And where was he? Where were the two defendants in the store when you came back?

A. They were on the main floor.

Q. Approximately where on the main floor?

A. Oh, a few feet from the stairs, at the bottom of the tea room.

Q. That is the stairs at the bottom of the tea room and not at the elevator?

A. Yes, just about the same place, just a few feet. The elevator is just about eight feet from the bottom of the stairs.

Q. And in which direction were these boys headed when you saw them?

[fol. 71] A. They were facing out and facing toward the street.

Q. Apparently on their way out of the store?

A. Possibly.

Mr. Anderson: That is all.

Redirect examination.

By Mr. Holt:

Q. Mr. Holt, you don't know what Mr. Tranfonte's conversation, if he had one, was with any of them, do you?

A. No. I was going about my business and he was talking to others while I was talking to some and I made the circuit of everyone there myself and I believe he had been talking to some if not all of them.

Q. And you did say that you did ask each of them to leave, including these two defendants?

A. That is correct.

The Court: Either one of you gentlemen want the witness any further?

Mr. Holt: No, sir.

Mr. Anderson: Just this question, Your Honor.

Recross examination.

By Mr. Anderson:

Q. Are you sure that you talked to everyone in the store, everyone of the defendants? I mean every one of the colored boys in the store?

A. That is right.

[fol. 72] The Court: Well, are you sure you talked to these two?

The Witness: I talked to these two in the store.

The Court: All right. That is what we are concerned with.

By Mr. Anderson:

Q. What reply, if any, did they give you?

A. They said they refused to leave.

Q. The two you questioned?

A. Yes.

Q. They said specifically, "We refuse to leave? I refuse to leave," or what?

A. I asked them to leave and they said, "We don't feel we ought to. Why should we?" The questions varied and

the answers varied from one to another, something like that.

Q. Did you identify yourself as the manager of the store?

A. I certainly did, in each case.

Q. Now, again, how many colored men were there?

A. Five.

Q. And there couldn't have been 12 or 15 in there at all?

A. Five are all I talked to and all I saw when I came in and I talked to each of them.

Q. Well, I mean you were in a position to observe whether [fol. 73] there were 12 or 15 people in there, negroes?

A. I don't recall that there were 12 or 15 in the tea room because I talked to each one that was in the tea room.

Mr. Anderson: That is all.

Redirect examination.

By Mr. Holt:

Q. There could have been some others in the other part of the store?

A. Oh, of course, I was concerned only with those in the tea room because those are the ones I talked to.

The Court: Well, these two were there?

The Witness: Yes, sir.

The Court: And you talked to them?

The Witness: (No response.)

Mr. Holt: No further questions.

Mr. Anderson: No questions. Oh, yes, sir, there is one more question.

Recross examination.

By Mr. Anderson:

Q. You say it took three minutes to go down and get the officers, is that correct?

A. Something like that.

The Court: You may be excused.

(Witness excused.)

[fol. 74] Mr. Holt: That is the State's case, Your Honor.

The Court: Ladies and gentlemen, we have reached the noon hour. It is the Court's duty as you all know to admonish you not to discuss this case among yourselves nor allow anybody to discuss it with you until it is finally submitted to you. If anybody attempts to do so, why notify the Court. As I have told you lots of times, if I forget that, that applies to all recesses. We are now going to recess for lunch until 1:30. Court will be in recess until 1:30.

Thereupon, the hearing was recessed until 1:30 o'clock p.m., Thursday, June 27, 1960.

[fol. 75] AFTERNOON SESSION

(1:30 o'clock, p.m., Thursday, June 27, 1960.)

(The following proceedings occurred in Chambers out of the presence of the Jury.)

MOTION FOR A DIRECTED VERDICT AND RULING THEREON

Mr. Branton: Come the defendants, and after the State's having announced that the State rests, the defendants move for a directed verdict of not guilty as to each defendant as to the alleged violation of Act 14 and the defendants also move to a directed verdict of not guilty as to the alleged violation of Act 226.

Now, in that connection, Judge, and in all seriousness as to that disturbing the peace statute violation, I thought the case the other day was pretty weak on the part of the State, but this one today, there is absolutely no testimony in the record whatsoever about any peace having been disturbed or threatened breach of the peace. In fact, the only thing in there was where one of the witnesses stated that people didn't come into the tea room during the time that he was there, nothing about any crowd or anything else.

The Court: Well, I believe one of the officers testified that two or three people gathered around and wanted to know what they were going to do and grumbled a little bit.

[fol. 76] I guess that is a sufficient case for the Jury.

Mr. Branton: Judge, seriously, there just isn't enough evidence to go to the Jury legally on that.

The Court: I will concede there is not as much as I would like to have.

Mr. Branton: Really, there isn't. That is as weak a case on something like that as—

The Court: About as weak as one I could let go to the Jury.

Mr. Branton: One that doesn't even make a factual case legally.

(Discussion off the record.)

The Court: Overruled. Save his exceptions.

(Thereupon, The Court and Counsel returned to the Court Room and thereafter occurred the following proceedings.)

The Court: It looks like the Jury is all present, gentlemen. I believe this is the same Jury. Yes, will it be stipulated that it is?

Mr. Branton: Yes, sir.

The Court: Good. Now, I think the State has rested. Is the Defense ready to proceed? Call your first witness.

Mr. Anderson: Yes, sir.

[fol. 77] Thereupon, FRANK JAMES LUPPER (col) one of the defendants herein, called as a witness in his own behalf, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Anderson:

Q. State your name?
A. Frank James Lupper.
Q. Where do you live, Frank?
A. 1817 Bishop.
Q. Is Little Rock your home town?
A. Yes, it is.

Q. How long have you lived here?
A. Nineteen years.
Q. And you are—how old are you?
A. Nineteen.
Q. Thank you. Do you recall the date of April 13, 1960?
A. Yes, sir, I do.
Q. Were you in the Gus Blass store on that date?
A. Yes.
Q. Are you a customer of Gus Blass?
A. Yes, I am.
Q. How long have you been a customer of Gus Blass?
[fol. 78] A. For some time. My mother has an account there and we—and been having an account there for about 19 or 20 years.
Q. In other words, your people have been customers of Gus Blass practically before you were born?
A. That is right.
Q. Will you state to the Court what occurred on the morning of April 13, 1960?
A. Yes, sir, on the morning of April 13, 1960, I entered Blass' Department Store about 11:35 and on my way up to the lunch room, I sat down at the table to be served and while I was there waiting a man came to me, I believe it was the manager for he said so. He asked me did I see the sign up on the wall and I told him no and he pointed to the wall and showed me a sign that I couldn't read at the distance I was at the time. I couldn't make out what it was and he said, he told me what was on the sign. He said that they had the right to choose who they would like to serve and he said do I understand. I told him—
Q. Did you tell him that you were a customer of Gus Blass?
A. Yes, I did.
Q. And then what did he say?
A. He said he couldn't help that. He said do I understand what he had just said.
Q. Then what did you do?
[fol. 79] A. I sat there and he went to the next person.
Q. Did he ask you to leave?
A. No, he did not.
Q. Did you refuse to—the request of anyone to leave?

A. No, I did not.

Q. Then what happened?

A. Well, after I sat there for sometime and I didn't get waited on, I decided to leave on my own and I walked down the stairs and when on out, turned to my right and as I was going outside I stopped at a counter to look at a pair of sunshades and just then a couple of officers walked in and asked the manager, "Is this the one?" And then he said, "I don't know," and he said, "Well, all you have to say is yes or no," and he said, "Yes," and then he said, "You are under arrest," and I said, "What charge," and he said, "Open charge," and then he took us down.

Q. Did the officer ask you had you refused to leave the store?

A. No.

Q. Or the alleged tea room?

A. No, he didn't ask me that.

Q. No officer asked you that at any time?

A. No.

Q. Nor did the manager of the store ask you?

[fol. 80] A. No.

Q. Nor did any person who was a representative of the Blass store ask you to leave?

A. No, sir, they didn't.

Q. While you were there, did you see, as you were coming out of the store, did you see Thomas Robinson?

A. Yes.

Q. Where was he?

A. He was at the top of the stairs when I saw him.

Q. Coming towards you?

A. Yes, and as I was leaving out, then everybody else was leaving out and then he turned around and followed me on out.

Q. While you were there, did you make any noises of any sort?

A. No, I did not.

Q. Were you loud?

A. No.

Q. Were you boisterous?

A. No.

Q. Did you threaten anybody there at any time?

A. No, I did not.
Q. Did you molest anybody?
A. No.
Q. Did anyone threaten you?
A. No.
Q. Were you molested by anyone?
[fol. 81] A. No.

Mr. Anderson: Your witness.

Cross examination.

By Mr. Holt:

Q. Did you sit down at the lunch counter?
A. No, I sat at the table.
Q. You sat at a table?
A. Yes, I did.
Q. Who sat with you?
A. Well, I don't know the fellow's name that sat with me, but there was another person.
Q. Well, was it one—was someone with you?
A. No, it wasn't someone with me. It was someone from the store.
Q. How many boys at the table?
A. Just one. There was two at the table, the other fellow and me.
Q. Had you ever seen him before?
A. Yes, I have.
Q. Well, you don't know who he was?
A. No, I don't know his name.
Q. Where had you seen him before?
A. Around the school, Philander Smith College.
Q. He went to school at Philander Smith?
[fol. 82] A. Yes.
Q. And was he sitting there when you sat down?
A. Yes.
Q. How long had he been there?
A. I don't know.
Q. Do you belong to any—
A. I sat down there first and then he sat down there.
Q. Do you belong to the NAACP?

A. No, I do not.

Q. Do your parents belong to them?

A. I don't know. I don't know. I don't believe so.

Q. Did somebody tell you to do this?

A. No.

Q. How many went down there with you?

A. I went down alone.

Q. By yourself?

A. By myself.

Q. You didn't know that that was what you were going to do when you got down there?

A. Yes, I knew that.

Q. Well, how did you know that you were going to do that when you went down there?

A. I went down there to do that.

Q. To sit down at the table?

A. To be served, yes.

[fol. 83] Q. Had you done that before?

A. No.

Q. Had you done it at any other store?

A. No.

Q. Why did you do it this day?

A. Because I am a customer of Blass Department Store.

Q. Why did you go there that day to be served at the lunch counter that day?

A. That day. Well, it could have been any other day. It just happened that is the day I decided to go down.

Q. And why did you pick April 13?

A. I didn't pick April 13.

Q. And you didn't know anybody else was going to sit down and ask for service?

A. No, I did not.

Q. Had you been instructed what to do if they asked you to leave?

A. No, I did not.

Q. Had anybody encouraged you to do this?

A. No.

Q. How many others? How many was in your crowd there?

A. In my crowd?

Q. Uh-huh.

A. What do you mean, in the store?

[fol. 84] Q. Yes.

A. I don't know. There was quite a few. There was about six.

Q. Now, you say you did have a crowd?

A. I didn't say I didn't have a crowd.

Q. And you said there was five or six?

A. You mean in the store while I was there, but not with me. I came in by myself.

Q. And then you had a crowd that you knew was going to sit down there?

A. No, I didn't know.

Q. What did you do when they asked you to leave?

A. He didn't ask me to leave.

Q. Well, now, you have been—you heard all these witnesses testify, is that right?

A. I heard them, yes, sir.

Q. And did not Captain Paul Terrell and Lieutenant Talbert talk with you?

A. Yes, they talked with me.

Q. Did they ask you if you sat down and refused to leave?

A. They asked me did I sit down.

Q. What did you tell them?

A. I said yes.

Q. Did they ask you if you refused to leave?

A. No, they did not.

[fol. 85] Q. Did Mr. Holt ask you to leave?

A. No.

Q. Did you see your—the defendant Robinson there?

A. Yes, I saw him.

Q. Was he sitting with you?

A. No, he wasn't.

Q. Where was he sitting?

A. I didn't see him sitting. I saw him at the top of the stairs.

Q. When?

A. As I was going out.

Q. Well, did you leave by yourself?

A. No, he followed me.

Q. Who followed you?

A. Robinson.

Q. And how long have you known him?

A. About five years, I imagine.

Q. And you didn't know that he was going to be there that day?

A. No, I did not.

Q. And he didn't know you were going to be there that day?

A. No, he didn't.

Q. What is the name of some of the other boys there?

A. Well, I don't know them.

Q. You don't know them?

A. I mean I just seen them around the school. I don't make it my business to find out their names.

[fol. 86] Q. Where do you go to school?

A. Philander College. Some of them just come around the school.

Q. And you had no meeting about going in there, several of you and sitting down?

A. No.

Q. Had you ever seen them do this before?

A. Yes, I have.

Q. Where?

A. I believe it was at Woolworths.

Q. How long before that?

A. Well, before that.

Q. How many days before that?

A. Not any time before that.

Q. Well—

A. I mean, you know, the states, I haven't seen it, but I have heard about them.

Q. You have been reading about them in the paper?

A. Yes.

Q. What prompted you to do that?

A. Well, I decided since I am a Blass customer and I buy a lot of things, I decided to go in and see if we could get served.

Q. Of what stores are you a customer?

[fol. 87] A. Well, Pfeifer's and Cohn's.

Q. And where?

A. Cohn's, M. M. Cohn Company and Blass, a few others and I just go in every once in a while, not all of the time.

Q. If another sit-down demonstration happened at Pfeifer's that day, did you know anything about it?

A. Well, after I had heard about it, I saw it happened.

Q. And you didn't know anything about that?

A. No, I didn't know it was going to happen.

Q. How did you get to town?

A. I drove in my car.

Q. Where did you park it?

A. I believe it is Columbus Street.

Q. How far did you have to walk?

A. Well, I say a block away, I imagine.

Q. What time did you get there?

A. Eleven thirty-five.

Q. Now, how do you remember eleven thirty-five?

A. Well, that is the time I got there. I remember it because I saw it on the clock as I walked in the place.

Mr. Holt: Your witness.

Mr. Anderson: That is all.

The Court: Call your next witness.

(Witness excused.)

[fol. 88] Thereupon, THOMAS B. ROBINSON (Col) one of the defendants herein, called as a witness in his own behalf, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. Anderson:

Q. State your name.

A. Thomas B. Robinson.

Q. And where do you live, Mr. Robinson?

A. 1216 West 9th.

Q. And where is your home city?

A. Little Rock, Arkansas.

Q. You are a native of Little Rock?

A. I am.

Q. I call your attention to April 13, 1960. Were you present? Were you in the Gus Blass store on that date?

A. I was.

Q. About what time were you there?

A. I guess it was between eleven forty-five and twelve o'clock. I am not sure.

Q. Approximately that time?

A. It was approximately.

Q. Well, state to the Court just what occurred.

[fol. 89] A. Well, I entered Gus Blass store and I—as I was going upstairs to the mezzanine to get served I noticed —I saw several people leave out of the store and I didn't know what reason they was leaving and so as I walked in I left—I left when I saw the other people leave and as I was about to leave out of the store this officer stopped me and he asked me was I upstairs and I said yes and he arrested us and we asked him what was the charge and he said, "Open charge."

Q. Did he ask you if you refused to leave?

A. No, he didn't.

Q. Did you make any statement with reference to your leaving?

A. No, only thing he asked us was I upstairs.

Q. Did you have an occasion to talk to Mr. Holt of Gus Blass Company?

A. No, the only time I saw Mr. Holt was when I was leaving the store, leaving with the officers that arrested us.

Q. Then Mr. Holt did not come to you sitting down at the table in the tea room of Gus Blass?

A. I did not sit down at the table at Gus Blass, so he couldn't have talked.

Q. Did you have any conversation of any kind?

A. No, I didn't.

Q. Then he said nothing to you at all?

[fol. 90] A. Nothing.

Q. Do you go—do you attend school?

A. Yes.

Q. Where do you attend school?

A. Philander Smith College.

Q. How long have you attended Philander Smith?

A. This will be my third year.

Q. How did you—when did you first—did you arrive at the store alone?

A. I did.

Q. Did you expect to meet anyone there?

A. Well, the store have a lot of people. I wasn't going to meet no one personally.

Q. I mean any special person?

A. No, sir, I wasn't expecting to meet no one.

Q. Then you only got in the store at the top of the stairs, is that correct, and you turned and came out?

A. I did.

Q. And you were stopped by the officers?

A. As I was leaving out of the store.

Q. And then you were placed under arrest?

A. Uh-huh.

Q. Did you talk to anybody while you were there?

A. No, no one.

[fol. 91] Q. Were you loud?

A. No.

Q. Were you boisterous?

A. No.

Q. Molest anybody?

A. No.

Q. Did you have any occasion to say anything to anybody?

A. No, I didn't.

Q. Then you had no conversation with any of the personnel in Gus Blass store?

A. I did not.

Q. And are you a customer or have you ever been a customer of Gus Blass?

A. I have bought clothes at Gus Blass. I am a customer.

Q. How long a period has that been?

A. Ever since I—I will say about ten years or more. I have been going there ever since I can remember.

Q. Since you were a child?

A. Since I was a child.

Q. And you have always been served there?

A. I have.

Mr. Anderson: Your witness.

[fol. 92] Cross examination.

By Mr. Holt:

Q. How old are you?
A. Twenty.
Q. How long have you lived in Little Rock?
A. Twenty years.
Q. What year school were you in?
A. Junior year.
Q. What kind of grades do you make?
A. I would rather not say.
Q. Do you belong to the NAACP?
A. Well, I used to belong to the Junior Council when I was in high school.
Q. You don't now?
A. I don't think they have a Junior Council now. If they do, I mean I might have.
Q. Are you a member of any group out at the school who has met and worked up a scheme to go in the stores and sit down?
A. No.
Q. You did go in Blass' store?
A. Yes.
Q. On April 13?
A. Yes; I did.
Q. You went there by yourself?
[fol. 93] A. Yes, I did.
Q. How did you get there?
A. In my car.
Q. Where did you park it?
A. I think I parked it down on Scott, about 3rd and Scott.
Q. What time did you get there?
A. It was close to twelve o'clock.
Q. Close to twelve?
A. Yes, about lunch time.
Q. No one was with you?
A. No one.
Q. Were you late?

A. Late? Late for lunch, no, I don't—I seen food and I don't think I was late. I seen people eating.

Q. Why did you go there?

A. Why did I go to Blass' store?

Q. Uh-huh.

A. I was looking for a suit.

Q. And you didn't sit down at the table or the lunch counter?

A. No, I didn't get a chance to.

Q. Why did they arrest you, if you didn't?

A. I don't know.

Q. Were you with the defendant, Lupper, there when they arrested him?

[fol. 94] A. Well, we were together when we got arrested.

Q. How did you happen to be with him then?

A. Well, as he was coming out, I guess we was coming out of the store at the same time.

Q. Well, why were you leaving the store?

A. Because I was ready to go.

Q. I thought you went there to buy a suit?

A. After I—after I had got upstairs and seen that it was impossible for me to get served, I decided to leave out.

Q. Impossible to get served what?

A. Food.

Q. Oh, you did go there to be served food?

A. Not solely. I got hungry as I was there and I went upstairs to get served.

Q. Well, did you ask to buy a suit while you were there?

A. No, I didn't.

Q. Where do they sell suits in the store?

A. They sell them on different—they sell them on the main floor.

Q. Well, where is the lunch counter?

A. It is on the mezzanine.

Q. And what, do they sell suits up there?

A. No.

Q. Why did you go up to the lunch counter?

[fol. 95] A. To eat.

Q. Where was Lupper when you got up there?

A. I don't know.

Q. Well, where did you get with Lupper?

A. Me and Lupper got arrested. We accidentally—I guess it was accidentally as we was coming out of the store. We was leaving the same entrance.

Q. Did you come down the stairs with him?

A. No.

Q. How did you come down, on the elevator?

A. No, I walked down the stairs.

Q. Walked down the steps. Did you walk down with you?

A. No, he didn't walk with me. He walked by himself.

Q. And did you go ahead of him or behind him?

A. I think I was behind him.

Q. Well, are you sure?

A. I am almost positive.

Q. Well, you remember being with him now or you remember where you were?

A. I remember seeing him as we were going out of the store.

Q. And were you together when the officers stopped you?

A. Yes, we were.

Q. Did you catch up with him or did he catch up with you?

A. No, he was looking at some shades.

[fol. 96] Q. And why, did you stop and talk to him?

A. Why did I stop to talk to him? I didn't stop to talk to him.

Q. Well, how did you happen to be right there with him then?

A. We was going out the same entrance and the police stopped us together.

Q. So you went there to buy a suit, but you got hungry while you were there?

A. That is right.

Q. And you did go up on the mezzanine?

A. I didn't understand you.

Q. You did go up where they served food?

A. I was going up towards there. I got as far as the entrance, the head of the steps.

Q. Were there any other boys up there sitting around at the tables when you got up there?

A. Boys?

Q. Yes.

A. There was a lot of people sitting around.

Q. Was there any colored boys up there?

A. Yes, there was.

Q. Were they sitting around?

A. They were sitting down at the tables and some at the counter.

Q. And you saw them sitting there?

A. After when I came up there, they were leaving.

[fol. 97] Q. And did you see them sit—

A. There were some of them leaving and some of them sitting down and then all of them leaving as I was coming in.

Q. Why did they leave?

A. I don't know.

Q. Did you see Lupper up there?

A. No, I didn't see Lupper. I don't remember seeing Lupper until I was on the main floor.

Q. How close did you get to the lunch counter?

A. To the top of the stairs.

Q. And you didn't get any closer?

A. That is as close as I got.

Q. And why did you turn around and leave?

A. Because I saw a lot of other people leave.

Q. Why was they leaving?

A. Well, it was obvious that I couldn't get served.

Q. Why did you think you couldn't be served?

A. Because I saw the other people leave out.

Q. And why were they leaving?

A. I don't know why. I presumed they left because they couldn't be served.

Q. Why couldn't they be served?

A. I really don't know. I guess because they are colored.

Q. Well, do you know why that these officers would tell a [fol. 98] story on you?

A. No, I don't.

Q. Did you see any other colored people sitting around there or in the store about your size and wearing glasses?

A. No, I can't say that I—

Q. Do you know why Mr. Holt would—have you ever had any trouble with him or anybody in the store there?

A. I never have seen him before we got arrested.

Q. And do you know why he would sit there and say that he asked—saw you sitting there and asked you to leave?

A. He might have made a mistake.

Q. Well, do you know of any other person there your size?

A. There's a lot of people in the store, that might have been.

Q. And your age?

A. There might have been.

Q. And you didn't tell the officers that you sat down and you refused to leave?

A. He asked me was I upstairs and I said yes.

Q. And you didn't tell him that you refused to leave?

A. No, he didn't ask me.

Q. And you didn't tell Mr. Holt when he walked up and asked you to leave that you wanted to be served and he said—

A. Mr. Holt didn't ask me.

Q. I say you didn't?

A. No, I didn't.

[fol. 99] Q. And he didn't tell you that he wasn't prepared to serve you at that time.

A. No, he didn't.

Q. And you didn't ask any questions why he wasn't?

A. I didn't.

Q. So how many—you say you had not discussed this with anybody about being there on that day?

A. No, I didn't.

Q. Nor at the time you would get there?

A. No.

Q. Or what you would do when you got there?

A. No.

Mr. Holt: Your witness.

Mr. Anderson: That is all.

(Witness excused.)

Mr. Anderson: The defendants rest, Your Honor.

The Court: The State have any rebuttal?

Mr. Holt: No, sir, Your Honor.

The Court: Ladies and gentlemen, if you will, be at ease a few minutes. Remember the Court's admonition about

discussion the case during recesses. We will go in and settle the instructions and be right back out.

[fol. 100] (Thereupon, the Court and Counsel retired to Chambers. Whereupon, the requested instructions of the State and the Defendants were read, all of which were given with the exception of two requested instructions by the Defendants as hereinafter appears.)

Defendant's Instruction No. 3:

You are instructed that if you find from the evidence that the conduct of other persons in the Blass Department store at the time complained of in this lawsuit was such as to tend to create a disturbance of the peace, or threaten a breach of the peace, but further find that the defendants did nothing more to create or bring about this conduct on the part of other persons other than by their presence at the lunch counter or in the restaurant and their request for service therein, then you should find the Defendants not guilty as to Act 226.

Mr. Branton: Note the objections of the Defendants.
The Court: Save his exceptions.

Defendants' Instruction No. 5:

You are instructed as a matter of law that the Defendants had a legal right to enter the Blass Department Store at the time of the incident complained of in the information and that they had a right to enter the restaurant or go to the lunch counter in said store and to request service at said store and that the actions of the Defendants, [fol. 101] or either of them, in seeking service at the said lunch counter or restaurant is not in of itself a violation of any law.

Mr. Branton: Note the objections of the Defendants.
The Court: Save his exceptions.
Mr. Branton: Note a general objection to the State's requested instructions.
The Court: Save his exceptions.

(Thereupon, the Court and Counsel returned to the Court Room and thereafter occurred the following proceedings.)

COURT'S INSTRUCTIONS TO JURY

The Court: Ladies and gentlemen, the Court is now going to give you the law in this case. I don't want you to single out any one of these instructions and attempt to decide the case on that. They all constitute the law and you are supposed to harmonize them and apply them to the evidence to the best of your ability. Just don't decide the case on any one particular instruction.

Both these defendants here are charged with the violation in the first count, or one count rather of violation of Section 1 of Act 226 of 1959. Section 1 of that Act reads as follows:

[fol. 102] "Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned in jail not more than six months, or both such fine and imprisonment."

Each of the defendants is also charged with violation of Section 1 of Act 14 of 1959, which reads as follows:

"Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and [fol. 103] upon conviction shall be fined not less than Fifty Dollars, nor more than $500, or by imprisonment not to exceed 30 days, or both such fine and imprisonment."

The defendants start out in the trial with the presumption of innocence in their favor and that follows them throughout the trial and until the evidence convinces you

of their guilt beyond a reasonable doubt, and that the offense occurred in this County and State within one year next before the filing of the information. The effect of this presumption is cast upon the State the burden of proving all the essential elements upon the defense beyond a reasonable doubt.

You have been told that you should give the defendants the benefit of a reasonable doubt. Reasonable doubt is not an impossible or an imaginary doubt because everything that depends upon human testimony is susceptible to some possible or imaginary doubt. To be convinced beyond the reasonable doubt is that state of the case which after the careful consideration and comparison of all the testimony leaves the minds of the jurors in that condition that they [fol. 104] feel an abiding conviction to a moral certainty of the truth of the charge. A moral certainty of the truth of the charge is such a certainty as you would be willing to act upon in the important affairs of your own life.

You are the sole judges of the credibility of the witnesses and the weight that should be given to their testimony. With that the Court has nothing to do. It is the province of the Court to declare to you the law applicable to any phase of the testimony, and it is your duty to apply that law to the testimony and to return a verdict in accordance with both the law and the testimony. You are to exercise your judgment and common sense, neither of which you are to leave behind you when you go into the jury room. You may judge the credibility of a witness by the manner in which he gives his testimony, the demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the defendants, or any circumstances tending to shed light upon the truth or falsity of such a statement and [fol. 105] it is for you last to say what weight you will give to the testimony of any and all witnesses.

You are instructed that if you find from the evidence that the defendants, or either of them, while in the Blass Department Store, did not use loud and offensive talk and made no threats to anyone, and did not attempt to intimidate anyone or do anything else which caused a disturbance

or breach of the peace or threatened breach of the peace, then you should find the defendants not guilty as to Act 226.

You are instructed that the defendants had a lawful right to enter the Blass Department Store, and to seek service at the lunch counter or in the restaurant of said store and unless you find that the defendants, or either of them, did some overt Act, other than to merely seek service from the store, which caused a disturbance or breach of the peace or threatened breach of the peace, then you should find the defendant, or defendants, not guilty as to Act 226.

If you find from the evidence that the defendants were requested to leave the lunch counter or restaurant of Blass [fol. 106] Department Store by a proper person in authority and that said defendants left the restaurant or lunch counter within a reasonable time after the request had been made to them, then you are instructed that you should find the defendants, or either of them, as the case may be, not guilty of violation of Act 14.

If you believe that the defendant, Thomas B. Robinson is guilty of violation of Act 226, you will say, "We, the Jury, find the Defendant, Thomas B. Robinson, guilty of violation of Act 226 of 1959 as charged," and fix his punishment at a fine of $..... or ..... imprisonment, that is, anywhere up to $500 on the fine or up to six months imprisonment or both a fine of $..... and imprisonment. In other words, under this section you may fine him or you may give him time on the county farm or you may both fine him and give him time on the county farm as the jury sees fit. Upon the other hand, if you feel like he is not guilty of violation of Act 226 or you have a reasonable doubt of it, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, not guilty of violation of Act 226 of 1959." If you feel like the defendant, Thomas [fol. 107] Robinson, is guilty of violation of Act 14, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, guilty of violation of Act 14 of 1959, as charged," and fix his punishment at a fine of $..... or ..... imprisonment, that is, fifty to to $500 and up to 30 days imprisonment or both a fine of $ ..... and imprisonment. In other words, you have the same option in that case. You may either fine him, you may give him the time

or you may both fine him and give him the time at your option. On the other hand, if you feel like he is not guilty of violation of Act 14 of 1959, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, not guilty of violation of Act 14 of 1959."

Now, if you feel like Frank Lupper is guilty of violation of Act 226 of 1959, you will say, "We, the Jury, find the defendant, Frank Lupper, guilty of violation of Act 226 of 1959 as charged," and fix his punishment at $..... and ..... imprisonment or both $..... and ..... imprisonment, that is, anything up to $500 or up to six months under Act 226, or you may either fine him or imprison him and you may both fine him and imprison him, of course, within the limits of the statute. On the other [fol. 108] hand, if you feel like he is not guilty of violation of Act 226 and if you have a reasonable doubt of his guilt, you say, "We, the Jury, find the defendant, Frank Lupper, not guilty of violation of Section 14 of 1959." If you find him guilty of Act 14 of 1959, you will say, "We, the jury, find the defendant, Frank Lupper, guilty of violation of Act 14 of 1959, as charged," and fix his punishment at a fine of $..... or imprisonment or both a fine and imprisonment, that is from fifty to $500 under Act 14 or not more than 30 days under Act 14. On the other hand, if you feel like he is not guilty of violation of Act 14, or you have a reasonable doubt of his guilt on the whole case, you say, say, "We, the Jury, find the defendant, Frank J. Lupper, not guilty of violation of Act 14 of 1959."

How long do you gentlemen want to argue the case?

Mr. Branton: About 20 minutes.

The Court: Twenty minutes to a side, Mr. Holt. It is about five minutes after three.

(Discussion off the record.)

[fol. 109] The Court: You may proceed, Mr. Holt.

(Thereupon, the matter was argued to the Jury by Counsel for the respective parties and thereafter occurred the following proceedings.)

The Court: Ladies and gentlemen, I will now give you the forms of verdict again. If you believe the defendant,

Robinson, is guilty of violation of Act 226, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, guilty of violation of Act 226 of 1959, as charged, and fix his punishment at a fine of $..... or ..... imprisonment or both a fine of $..... and ..... imprisonment." In other words, you may fine him or you may imprison him or you may fine him and imprison him both at your option under the limits to which you may decide under Act 226. You may fine him up to $500 or you may imprison him up to six months; on the other hand if you feel like he is not guilty of violation of Act 226 or there is a reasonable doubt in your mind on the whole case, you say, "We, the Jury, find the defendant, Thomas B. Robinson, not guilty of Act 226 of 1959." On the other charge as to Robinson, if you feel like he is guilty of violation of Act 14 [fol. 110] of 1959, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, guilty of violation of Act 14 of 1959 as charged and fix his punishment at a fine of $..... or imprisonment or both a fine of $..... and ..... imprisonment." The range that you have to choose from there is fifty to $500 and up to 30 days. On the other hand, if you feel like he is not guilty of violation of Act 14 or have a reasonable doubt of his guilt, you will say, "We, the Jury, find the defendant, Thomas B. Robinson, not guilty of Act 14 of 1959."

As to Frank Lupper, if you feel like he is guilty of violation of Act 226 of 1959, you will say, "We, the Jury, find the defendant, Frank Lupper, guilty of violation of Act 226 of 1959, as charged, and fix his punishment at a fine of $..... or ..... imprisonment or both a fine of $..... and ..... imprisonment." Your range there is up to $500 and up to six months. If you feel like he is not guilty of violation of Act 226, you will say, "We, the Jury, find the defendant, Frank J. Lupper, not guilty of violation of Act 226 of 1959."

[fol. 111] If you feel like that Lupper is guilty of violation of Act 14 of 1959, you will say, "We, the Jury, find the defendant, Frank J. Lupper, guilty of violation of Act 14 of 1959, as charged, and fix his punishment at a fine of $..... or ..... imprisonment or both a fine of $..... and ..... imprisonment and your range

there is fifty to $500 on the fine and not more 30 days on the imprisonment. On the other hand, if you feel like he is not guilty of violation of Act 14 or you have a reasonable doubt of his guilt, you will say, "We, the Jury, find the defendant, Frank J. Lupper, not guilty of Act 14 of 1959."

These verdicts must be signed by one of you ladies or gentlemen as foreman and they must be unanimous. You may retire and consider your verdict.

(Thereupon, the jury retired at 3:45 p.m., Thursday, June 17, 1960, to consider its verdict and returned to the Court Room at 4:00 o'clock, p.m., of the same day and thereafter occurred the following proceedings.)

JURY'S VERDICT

The Court: All right. Ladies and gentlemen, have you reached a verdict?

[fol. 112] The Jurors: We have, sir.

The Court: Mr. Foreman, will you hand your verdict to the Clerk? Will the defendants please rise? Mr. Clerk, will you read the verdict to the defendants?

The Clerk: We, the Jury, find the defendant, Frank J. Lupper, guilty of violation of Act 226 of 1959, as charged and fix his punishment at both a fine of $500 and six months imprisonment. Signed Joe Herrick, Foreman.

We, the Jury, find the defendant, Frank J. Lupper, guilty of violation of Act 14 of 1959, as charged, and fix his punishment at both a fine of $500 and 30 days imprisonment. Signed Joe Herrick, Foreman.

We, the Jury, find the defendant, Thomas B. Robinson, guilty of violation of Act 226 of 1959, as charged, and fix his punishment at a fine of $500 and six months imprisonment. Signed Joe Herrick, Foreman.

We, the Jury, find the defendant, Thomas B. Robinson, guilty of violation of Act 14 of 1959, as charged, and fix his punishment at a fine of $500 and 30 days imprisonment. Signed Joe Herrick, Foreman.

[fol. 113] The Court: Is that the verdict of each and every one of you ladies and gentlemen?

The Jurors: It is, sir.

The Court: Does the defense wish the jury polled?

Mr. Branton: No, sir.

The Court: Well, ladies and gentlemen, you will be discharged. Please report back Monday morning at 9:30. Thank you very much.

Thereupon, the hearing was closed.

[fol. 114]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIRST DIVISION

JUDGE'S CERTIFICATE—July 26, 1960

And now on the 26th day of July, 1960, and well within the thirty days heretofore by the Court granted herein to file their Bill of Exceptions, come the defendants herein and present to Honorable William J. Kirby, the regular Judge of the Pulaski Circuit Court, First Division, who was present and presiding at all times upon the trial of this cause, this, their Bill of Exceptions herein, which is by said Judge examined, found to be a complete and correct record thereof, and same he now approves as such and orders that same be filed as a part of the record in this cause.

Witness my hand as such Judge of the Pulaski Circuit Court, First Division, on this 26th day of July, 1960.

Wm. J. Kirby, Circuit Judge.

Approved:

Dennis W. Horton, Deputy Prosecuting Attorney.
Harold B. Anderson, Attorney for Defendants.

[fol. 115] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 116] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 117]

IN THE SUPREME COURT OF ARKANSAS

No. 4992, 4994, 4997

Appeal From Pulaski Circuit Court; Hon. William J. Kirby, Judge.

Reversed and Dismissed in Part. Affirmed in Part.

CHESTER BRIGGS, et al., Appellants,

v.

THE STATE OF ARKANSAS, Appellee,

Consolidated with

EUGENE D. SMITH, et al., Appellants,

v.

THE STATE OF ARKANSAS, Appellee,

Consolidated with

JAMES FRANK LUPPER, et al., Appellants,

v.

THE STATE OF ARKANSAS, Appellee.

OPINION DELIVERED—May 13, 1963

JIM JOHNSON, *Associate Justice*:

These are the so-called "sit-in" cases. They were submitted to this court on January 16, 1961. At that time there were cases claimed to be similar pending in other states.[1] By common consent our decision was delayed

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[1] *Henderson* v. *Trailways Bus Co.* (Va.), 194 F. Supp. 423; *Randolph* v. *Commonwealth* (Va.), 119 S.E. 2d 817; *State* v. *Williams* (N.C.), 117 S.E. 2d 824; *Samuels* v. *State* (Ga.), 118 S.E. 2d 231; *Briscoe* v. *State* (Tex.), 341 S.W. 2d 432; *Walker* v. *State* (Ga.), 118 S.E. 2d 284; *State* v. *Fox* (N.C.), 118 S.E. 2d 58; *Rucker* v. *State* (Tex.), 342 S.W. 2d 325; *Burton* v. *Wilmington (Del.) Parking Authority*, 365 U.S. 715; *Williams* v. *Hot Shoppes, Inc.*, C.A.D.C., April 20, 1961, No. 15610; *Gober* v. *City of Birmingham* (Ala.), 133 So. 2d 697.

awaiting the outcomes of cases then pending in which petitions for certiorari to the United States Supreme Court had been filed. Since then additional petitions have been filed and there are now pending before the United States Supreme Court at least three cases of this nature in which certiorari has been granted. See *Avent* v. *North Carolina*, cert. 370 U.S. 934; *Peterson* v. *City of Greenville*, cert. 370 U.S. 935; *Lombard* v. *Louisiana*, cert. gr. 370 U. S. 935. We were particularly interested in the outcome of the [fol. 118] "Garner cases", *Garner* v. *Louisiana*, 368 U.S. 157, 82 Sup. Ct. 248, 7 L.Ed. 2d 207, which appeared to be in point with the cases at bar. From the opinion of the United States Supreme Court in these cases, which were decided December 11, 1961, it developed that the cases did not involve a situation similar to ours and therefore afforded no persuasive authority.

While we originally intended to delay our decision until the United States Supreme Court had decided a case in point with ours, it is against our policy to delay for too long our decision in any pending case. We ascribe to the theory that justice delayed is justice denied. For many years when this court goes into summer adjournment all cases ready for submission have been decided except some rare case like these which is carried over for a definite reason. These cases have now been pending for over two years. We do not feel that we can properly delay them longer to await a decision of the United States Supreme Court. In order to avoid carrying these cases over another summer we now proceed to a decision.

Our cases here were consolidated.[2] They consisted of three criminal prosecutions against 13 defendants. The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes. The three cases involve separate incidents at separate retail establishments. There are factual and legal differences necessitating a different disposition of the cases of one group of appel- [fol. 119] lants as compared to the other two groups.

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[2] The cases were consolidated for briefing upon motion of appellants.

Case No. 4992, styled *Briggs et al.* v. *State*, is a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at F. W. Woolworth Company in Little Rock on March 10, 1960.

Case No. 4994, styled *Smith et al.* v. *State*, is also a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at Pfeifers Department Store in Little Rock on April 13, 1960.

Case No. 4997, styled *Lupper et al.* v. *State*, is a prosecution under Act 226 and also under Act 14. It involves a "sit-in" at the Gus Blass Store in Little Rock on April 13, 1960.

In the *Briggs* case, the evidence shows that the Negro defendants seated themselves at a lunch counter in Woolworth's and refused to leave when ordered to do so by police officers. The evidence is undisputed that these defendants were not requested to leave by the management or by anyone with authority to act for the management.

In the *Smith* case, the record shows that all defendants but one left the premises promptly upon the request of the manager.

The *Lupper* case was tried to a jury and there is adequate evidence on behalf of the State to support a finding that these two defendants, James Frank Lupper and Thomas B. Robinson, refused to leave the Gus Blass Store at the request of the manager.

Act 226 Cases

We see no distinction in fact or law between the three [fol. 120] prosecutions under Act 226 of 1959. Therefore, we will discuss the three cases together insofar as Act 226 is concerned. Of course, it will be necessary to discuss the prosecution under Act 14 separately.

For reversal of the Act 226 cases, it is insisted that:

(1) The Act is unconstitutional because it denied defendants due process and equal protection of the law.

(2) The Act has been applied in an unconstitutional manner.

(3) The evidence was insufficient to support a conviction; and,

(4) The judgment was excessive and harsh.

Since we are of the opinion that Point 3 is well taken,[3] we will not pass upon the constitutionality of Act 226 of 1959. This is in accordance with the established rule of this court that constitutional questions will not be decided where the case may be disposed of on other grounds. *Bailey* v. *State*, 229 Ark. 74, 313 S.W.2d 388; *Bowling* v. *State*, 229 Ark. 876, 318 S.W. 2d 808.

Section 1 of Act 226 of 1959 [§41-1432 Ark. Stats.] reads as follows:

> "Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a [fol. 121] breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment."

Under this Act the prohibited offenses are creating disturbances or breaches of the peace. The Act sets forth loud and offensive talk, the making of threats and attempts to intimidate as examples of prohibited conduct. While there was some evidence on the part of the State to the effect that feeling and tension were high, the State offered no substantial evidence that these defendants entered the store to carry out a conspiracy to cause a breach of the

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[3] It is noted that these appellants were charged and convicted of a violation of Act 226 of 1959 exclusively and not for a violation of the prohibitions contained in Ark. Stats. §41-1401 or §41-1403, the general disturbance of the peace statutes.

peace, nor was there evidence that these defendants or any of them uttered any loud offensive talk, made any threats or attempted to intimidate anyone. The defendants had a right to peacefully seek service at the lunch counters. By the same rule, management had a right to refuse to serve them. Since the peaceful efforts of the defendants to get service at the lunch counters were lawful, and in the absence of a substantial showing that such efforts were organized and calculated to disturb or breach the peace, it cannot be said here that the mere making of these efforts amounted to "creating a disturbance or breach of the peace." It is obvious that the Act contemplates a doing of that which the actor has no legal right to do. The defendants in the *Briggs* case refused to leave at the command of the police officers but in the absence of a [fol. 122] request by management of the officers to order appellants to leave the premises, the officers had no right or authority to give such orders. There is no contention in this case that the officers had received such a request from management. Hence, the refusal of the defendants to leave was not unlawful and could not have been unlawful until they refused to leave at the request of the management or the officers in compliance with a request from management. In the *Smith* case all defendants but one left promptly at the request of the management. Certainly those leaving were guilty of no offense. The case of the one individual (in the *Smith* case) who did not leave promptly gives us more concern. However, we are constrained to believe that any unrest, tension or disturbance existent in the Pfeifer store at that time had already been created by the unlawful efforts of all the defendants to obtain service. There is no showing that this act of the defendant created a disturbance or breach of the peace. A different question would be presented had this defendant been prosecuted under Act 14 of 1959 but no such charge was placed against him.

The point which we wish to make completely clear is that the mere fact that the exercise of a lawful right may result in a disturbance or breach of the peace does not make the exercise of that right a violation of the law so

long as the right is exercised in a peaceful manner and without force or violence or threats of same. Therefore, we conclude that all defendants in all prosecutions under [fol. 123] Act 226 of 1959 should have been acquitted.

In the *Lupper* case, which involves violations of Act 14 of 1959, as well as violations of Act 226, the appellants make the same contentions as to Act 14 as are made as to Act 226 and an additional point is raised as to alleged error in refusing to give certain instructions.

Due Process & Equal Protection of Laws

Section 1 of Act 14 of 1959 [41-1433 Ark. Stats.] reads as follows:

> "Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Appellants assert that Act 14 is unconstitutional in that it denies them equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article II of the Constitution of Arkansas, and cite *United States* v. *Miller*, 17 F. Supp. 65; and *Lanzetta* v. *New Jersey*, 306 U.S. 451, Sup. Ct. , 83 L. Ed. 888. It is contended that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the [fol. 124] owner or manager a misdemeanor.

It is suggested that the Act could be construed so as to allow an owner or manager to invoke the same because a customer was demanding a refund of money paid for merchandise or because a customer was demanding a delivery of merchandise which he had purchased. Assuming this to be true, we see no reason why the Act amounts to a denial of due process or equal protection of the laws. To remain upon the premises of another after having been requested to leave amounts to a trespass. *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295. This does not mean that under the hypothesis suggested by appellants that the aggrieved customer would have no remedy because if management had failed to return his money or deliver merchandise purchased, an action would lie in the courts of this State and the customer could be fully compensated for the failure to return the money or deliver the merchandise. A bill collector has a right to attempt to collect what is due him but he has no right to commit a trespass in the process.

By its terms and on its face, the statute applies to all who refuse to leave and it is not restricted to negroes. There is nothing uncertain, indefinite or vague about Act 14. It prohibits trespass.

While the Legislature and not this court determines public policy by statutory enactments, we feel that it is a wise policy to prevent possible violence and bloodshed by providing criminal sanctions against trespass. We have [fol. 125] held that a citizen of this State may use force and violence short of killing to protect his property against trespass even though the trespasser makes no effort to commit a felony. *Carpenter* v. *State*, 62 Ark. 286, 36 S.W. 900. The statute here in question simply provides a means whereby the owner of property may be protected in his use and possession of such property without having to resort to force and violence. We are impressed with the proposition that without this salutary statute, violence in repelling trespassers could become commonplace. Certainly, it is in the interest of the public and a valid exercise of the police power to protect the public peace by criminal sanction against trespass. Article 2, § 22 of the Constitution of Arkansas in part is as follows:

"The right of property is before and higher than any constitutional sanction. . . . "

The right to hold and enjoy property free from interference by others is one of the most precious rights enjoyed by the citizens of this State. They are entitled to be protected in this right against all trespassers without regard to whether they are colored or white.

The appellants complain that the Act does not require any *mens rea* or criminal intent on the part of the offender. We again disagree; the intent to remain after being requested to leave is a criminal intent.

Unconstitutional Application of Act 14

The appellants contend that Act 14 has been unlawfully and unconstitutionally administered because it is said that [fol. 126] the Act would not be invoked or enforced against a white man under the same or similar circumstances, thereby denying appellants equal protection of the laws. There is absolutely no evidence in the record to justify such an assertion. On its face the Act is applicable to all persons without regard to race. Appellants made no effort to adduce evidence to prove that white persons had violated the Act; that these violations were known to the officers and prosecuting authorities and that no arrests and prosecutions had followed such violations. Such proof would have been necessary in order to justify the present contention. See: *Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S.W.2d 679, Certiorari denied, 352 U.S. 894, 77 Sup. Ct. 125, 1 L. Ed. 2d 85; also see: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Snowden* v. *Hughes*, 321 U.S. 1, 64 Sup. Ct. 397, 88 L. Ed. 497; *Hickinbotham* v. *State*, 227 Ark. 1032, 303 S.W.2d 565.

The appellants have not shown, nor have we been able to find from the record, a single discriminatory act on the part of the State in the enforcement of this statute. It is not unusual for persons charged with crime to assert "discrimination", however, unsupported assertions cannot be held to take the place of evidence.

State Action

Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia*, [fol. 127] *Shelley* v. *Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge*, 334 U.S. 24, 68 Sup. Ct. 847, 92 L. Ed. 1187; *Barrows* v. *Jackson*, 346 U.S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586; and *Valle* v. *Stengel*, 176 F. 2d 697. This argument is completely untenable because it presupposes a right in the Negro defendants to be served by the lunch counter operators. In all of the cited cases from the Supreme Court of the United States it is either assumed or specifically stated that the Negroes involved had a right to own and occupy the property in question. In the *Valle* case, the State of New Jersey had enacted a statute giving all persons, irrespective of color, the right to admission of places of public accomodation such as the swimming pool there in question.

There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accomodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants.

Appellants place great reliance on the language in *Valle* v. *Stengel*, *supra*, with reference to the right to contract. However, a reading of the *Valle* case shows that the court merely held that the Fourteenth Amendment and the Federal Civil Rights Statutes only guaranteed to Negroes "a civil status equivalent to that enjoyed by white persons." As previously mentioned, New Jersey had a "public ac- [fol. 128] comodation" statute guaranteeing to all persons, regardless of color, the right to admission to the swimming pool in question. This is considerably different from the situation in the case at bar. Arkansas has no "public accomodation" statute. Management can arbitrarily order white persons to leave lunch counters for any reason whatever. While appellants expound forcefully of the equal privileges and immunities provisions of the Four-

teenth Amendment, we cannot escape the conclusion that they are urging this court to grant them an unequal privilege, that is the right to be served in a restaurant because they are colored, even though a corresponding right does not exist in white persons. Appellants' argument must fail because they, regardless of color, had no right or privilege to be served. To hold otherwise would be to employ judicial fiat to coerce unwilling lunch counter operators to afford service to patrons they do not want and did not seek. It can add nothing to the argument to say that they did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing the criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States. There is no privilege or immunity to trespass on private property. It should be remembered that the operators of the lunch counter in question have a right not to be deprived of their property without due process of law. This right is guaranteed to them under the same provisions [fol. 129] of the Constitution now sought to be invoked by appellants. To hold that anyone may trespass at will simply because his color is different from that of the property owner and that the law is powerless to protect the injured party would be inviting property owners to provide their own means of evicting trespassers. This would not be consonant with the principles of a nation which regards good order as one of the fundamental objectives of society. The Supreme Court of the United States has approved a municipal ordinance designed to prevent trespass by providing that it should be unlawful for magazine subscription solicitors to go upon private property for the purpose of soliciting orders without having been requested or invited to do so. *Breard* v. *Alexandria*, 341 U.S. 622, 71 Sup. Ct. 920, 95 L.Ed. 1233. In the *Breard* case the court rejected arguments of the appellant solicitor that the ordinance violated: (a) The due process clause of the Fourteenth Amendment; (b) The Federal Commerce Clause; (c) The guarantees of the First Amendment of freedom of speech and the press (made applicable to the states by the Fourteenth Amendment).

In the *Breard* case the court said:

> "Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, *Hall* v. *Virginia* does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 1247, a City Council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass upon private grounds after notice. Thus, the *Marsh* and *Tucker* cases are not applicable here."

[fol. 130] We think the quoted language makes it abundantly clear that the act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment. The same language also makes it clear that in prosecuting for trespass the State is making a valid exercise of police power. In other words, it makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination.

Sufficiency of Evidence in Lupper Case

As previously mentioned, there was sufficient evidence to support the verdict of the jury in finding that the defendants Lupper and Robinson refused to leave the premises after having been requested to do so by the manager. It is not our province to pass upon the weight of the evidence. It requires no citation of cases as to the familiar rule that we may not go behind the verdict of a jury which is supported by substantial evidence.

Refusal of Requested Instructions

The appellants complain of the action of the trial court in refusing to give two instructions requested by them. However, a comparison of the instructions which were re-

fused with those which were given by the court makes it crystal clear that the subject matter of the rejected instructions was adequately covered by the instructions given. *Harrison* v. *State*, 222 Ark. 773, 262 S.W. 2d, [fol. 131] 907.

Excessiveness and Harshness of Judgment

The appellants contend that the fines and punishment meted out to them were excessive and harsh even though they did not exceed the penalties provided by Act 14. This contention has been rejected many times by this court. See: *Johnson* v. *State*, 214 Ark. 902, 218 S.W. 2d 687.

Conclusion

For the error indicated, the convictions under Act 226 of 1959 are reversed and the cases having been fully developed are dismissed.

The convictions of Lupper and Robinson under Act 14 of 1959 are affirmed.

Robinson, J., dissents in part: Holt, J., disqualified.

[fol. 132] IN THE SUPREME COURT OF ARKANSAS

October Term 1962

CHESTER BRIGGS et al., Appellants,

vs.

THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court, First Division

JUDGMENT—May 13, 1963

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, First Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that so much of the

proceedings and judgment of said circuit court involving the convictions of appellants Lupper and Robinson under Act 14 of 1959 should be affirmed.

It is, therefore, considered by the Court that so much of the judgment of said circuit court in this cause rendered be, and the same is hereby, affirmed.

But it is further the opinion of the Court that there is error in so much of the proceedings and judgment of said circuit court in this cause which upheld the convictions of all the appellants under Act 226 of 1959.

It is, therefore, considered by the Court that so much of the proceedings and judgment of said circuit court be, and the same is hereby, reversed, annulled and set aside; and that this cause be dismissed.

It is further considered that said appellants recover of said appellee all their costs in this Court, in this cause expended. Robinson, J., dissents in part; Holt, J., disqualified.

May 13, 1963

[fol. 133] [File endorsement omitted]

IN THE SUPREME COURT OF ARKANSAS

No. 4997

JAMES FRANK LUPPER et al., Appellants,

vs.

STATE OF ARKANSAS.

PETITION FOR REHEARING—Filed May 24, 1963

Comes the Appellants James Frank Lupper et al. by their Attorneys Wiley A. Branton and Harold B. Anderson and petitions this Honorable Court for a rehearing of the above styled case for the following reasons:

1. That the U. S. Supreme Court on May 20, 1963 has subsequent to this opinion delivered May 13, 1963, rendered opinions in Peterson v. Greenville #71;

Gober v. Birmingham #66; Avent v. N. C. #11; Lombard v. La. #58; etc. Which appellant believe would cause this court to rule differently.

2. That this case considered in the light of these opinions declare this law unconstitutional in its application if not on its face.

Wherefore, Appellants pray that this petition be granted and for all further and proper relief.

Harold B. Anderson, Wiley A. Branton, Attorneys for Appellants.

Certificate of Service (omitted in printing).

[fol. 134]

IN THE SUPREME COURT OF ARKANSAS

October Term 1962

No. 4997

On Rehearing

Rehearing Denied.

JAMES FRANK LUPPER et al., Appellants,

vs.

THE STATE OF ARKANSAS, Appellee.

SUPPLEMENTAL OPINION DENYING REHEARING—
Delivered June 3, 1963

JIM JOHNSON, Associate Justice

Subsequent to the opinion delivered by this court in *Lupper* v. *State* on May 13, 1963, the United States Supreme Court on May 20, 1963, rendered opinions in four "sit-in" cases the pendency of which was specifically referred to in our opinion as cases in the nature of and similar to the

cases at bar. The four cases are *Avent* v. *North Carolina*, #11; *Peterson* v. *City of Greenville*, #71; *Lombard* v. *Louisiana*, #58; and *Gober* v. *Birmingham*, #66.

Within the time prescribed by the rules of this court, appellants have petitioned for a rehearing urging reconsideration of our opinion in the light of these recent pronouncements of the United States Supreme Court.

A careful examination of copies of the official opinions in these cases furnished us by the Government Printing Office discloses that the court [in *Lombard* v. *Louisiana*, #58] summarized its own holdings as follows:

> [fol. 135] "We have . . . held . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."

In compliance with petitioners' request for review, we have reexamined our opinion in the light of the cited cases and find that appellants did not claim nor was there any showing made relative to the existence of a state law or municipal ordinance in the City of Little Rock which made it unlawful for owners or managers of restaurants or lunch counters to seat whites and Negroes together. Further, appellants did not claim nor was there any showing made that any official command was issued which could remotely have the coercive effect of a law requiring segregation of the races in restaurants or lunch counters. In fact, from our assiduous review of the entire record before us, we have been unable to find any claim, evidence or showing indicating in the slightest respect that the decision of the manager in the case at bar to exclude these petitioners from the lunch room was anything except the exercise of freedom of choice. Having thus reviewed our opinion in the light requested, rehearing is denied.

[fol. 136]

IN THE SUPREME COURT OF ARKANSAS

JAMES FRANK LUPPER, et al., Appellants,

vs.

STATE OF ARKANSAS, Appellee.

MOTION TO STAY MANDATE

Comes the Appellant by the Attorneys Harold B. Anderson and Wiley A. Branton, petitions the court to Stay the Mandate in the above style case while petitioners perfects a petition for a writ certiorari.

Respectfully submitted,

Harold B. Anderson, Wiley A. Branton.

[fol. 137] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. 432, October Term, 1963

FRANK JAMES LUPPER, et al., Petitioners,

vs.

ARKANSAS.

ORDER ALLOWING CERTIORARI—June 22, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]5

FRANK JAMES LUPPER, *et al.*,

Petitioners,

—v.—

STATE OF ARKANSAS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

FRANK JAMES LUPPER, *et al.*,

Petitioners,

—v.—

STATE OF ARKANSAS,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, entered in the above-entitled case on May 13, 1963, rehearing of which was denied on June 3, 1963.

Citation to Opinions Below

The opinion of the Supreme Court of Arkansas (R. 117) is reported at 367 S. W. 2d 750. The opinion of the Supreme Court of Arkansas on petition for rehearing (R. 134) is reported at 367 S. W. 2d 760.

Jurisdiction

The judgment of the Supreme Court of Arkansas (R. 132) was entered on May 13, 1963. The petition for rehearing was denied (R. 134) on June 3, 1963.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Question Presented

Whether the due process and equal protection clauses of the Fourteenth Amendment permit a state to use its executive and judiciary to enforce racial discrimination in conformity with a state custom of discrimination by arresting and convicting petitioners of refusal to leave the premises of a business which has for profit opened its property to the general public.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 41-1433 of the Arkansas Statutes (Acts 1959, No. 14, §1, p. 29):

> "Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Statement

Between 11:30 A.M. and 12:00 noon on April 13, 1960, petitioners entered the Blass Department Store in Little Rock, Arkansas. Petitioners, part of a group of five or more Negroes (R. 72), proceeded upstairs from the main floor to the mezzanine, where a lunch counter and several tables are located (R. 37, 59). Mr. Henry Holt, store manager, testified that petitioners were among the group which took seats at the lunch counter and tables (R. 65-66) and that although he identified himself as store manager (R. 72) and asked them to leave (R. 65), the petitioners refused to do so (R. 65).[1] Upon their refusal to leave, Mr. Holt and Mr. Trianfonte, assistant store superintendent, left the premises and sought the police (R. 66).[2] Captain Paul Terrell of the Little Rock Police Department testified that he, Lieutenant Talbert and Officers Baer and Thomas were standing across the street from the store (R. 35, 66) when Mr. Holt and Mr. Trianfonte approached them and complained that "they had colored boys" (R. 35). The policemen entered the store and saw the petitioners on the main floor (R. 36). Captain Terrell, Lieutenant Talbert and Officer Baer testified (R. 36-37, 45, 52, 54) that they asked the petitioners whether they had been seated upstairs and whether they had refused to leave upon request. According to these policemen, the petitioners admitted that they had (R. 37, 45, 52, 54).[3] Then petitioners were arrested.

---

[1] Petitioners denied that they had been asked to leave (R. 79, 85, 89, 98-99).

[2] They were not difficult to find since Officer Baer had telephoned headquarters when he saw the Negroes entering the store (R. 51).

[3] Petitioners disputed this (R. 79, 84, 89, 98).

It is undisputed that petitioners were at all times neat, quiet and orderly (R. 39, 48, 59, 68).[4]

Petitioners were charged with breach of the peace in violation of Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959) and with refusal to leave a business establishment after request in violation of Section 41-1433, Arkansas Statutes (Section 1 of Act 14 of 1959).

They were tried on April 21, 1960 in the Municipal Court of Little Rock and convicted on both charges (R. 1, 3). Thereupon they appealed to the Pulaski County Circuit Court, where trial was had before a jury on June 17, 1960. Each was again convicted on both charges and each received a fine of $500.00 and 6 months' imprisonment on the Act 226 violation and a fine of $500.00 and 30 days' imprisonment on the Act 14 violation (R. 16-17).

Thereafter, the petitioners took an appeal to the Supreme Court of Arkansas. This appeal was consolidated for briefing with *Briggs* v. *State* (no. 4992) and *Smith* v. *State* (no. 4994) (R. 118; appendix, *infra*, p. 3a). On May 13, 1963, the Supreme Court of Arkansas handed down its decision, reversing all the Act 226 convictions for lack of evidence and affirming the Act 14 convictions of the petitioners. The petitioners petitioned the Supreme Court of Arkansas for rehearing (R. 133; appendix, *infra*, p. 17a) which was denied (R. 134; appendix, *infra*, p. 18a) on June 3, 1963.

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[4] This fact dictated reversal of petitioners' convictions of breach of the peace by the Supreme Court of Arkansas (R. 117-123; appendix, *infra*, pp. 1a-7a).

How the Federal Questions Were Raised and Decided Below

Prior to trial in the Pulaski County Circuit Court, First Division, petitioners filed a motion to dismiss as to Act 14 (Arkansas Statutes §41-1433).

Petitioners alleged (R. 9-10):

2. That there is a violation of the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution in that an instrumentality of the State—by the judicial enforcement of Act 14—is being utilized against these defendants to prevent them and all other Negroes from securing equality of treatment by peaceful persuasion.

3. That there is a violation of due process of law in that an instrumentality of the State seeks to compel the adherence to an arbitrary standard applied to Negro invitees by private establishments by the enforcement of Act 14, all in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That there is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the State has made available to private establishments—by the enforcement of Act 14—the full coercive power of government to aid in the discrimination of Negro invitees because of their race and color.

5. That there is a violation of the Constitution of the United States in that the State is using its criminal statutes to maintain racial segregation and discrimination.

The motion was overruled (R. 16). Similar objections were raised in a motion to quash or dismiss the information (R. 11-15), which also was overruled (R. 16).

At the close of the prosecution's case, petitioners moved for a directed verdict of not guilty as to each defendant as to the alleged violation of Act 14 (R. 75). The motion was overruled (R. 76). Following the verdict of guilty on both charges, petitioners moved for a new trial (R. 18), renewing their constitutional claims raised in the motion to dismiss. This motion also was overruled (R. 20).

Petitioners appealed to the Supreme Court of Arkansas, which affirmed the convictions under Act 14.

The Supreme Court of Arkansas declared (R. 126-127; appendix, *infra*, p. 10a):

> Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia*, *Shelley* v. *Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge*, 334 U. S. 24, 68 Sup. 847, 92 L. Ed, 1187; *Barrows v. Jackson*, 346 U. S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586. . . . This argument is completely untenable. . . .

The Supreme Court of Arkansas further declared:

> It can add nothing to the argument to say that they [lunch counter operators] did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States (R. 128; appendix, *infra*, p. 12a).

> [T]he act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment (R. 130; appendix, *infra*, p. 13a).
>
> [I]t makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination (R. 130; appendix, *infra*, p. 13a).

The Supreme Court of Arkansas had delayed decision of the appeal since January 16, 1961 (R. 117; appendix, *infra*, p. 2a) awaiting the decision by this Court of *Avent* v. *North Carolina*, 373 U. S. 375; *Peterson* v. *City of Greenville*, 373 U. S. 244; and *Lombard* v. *Louisiana*, 373 U. S. 267. Nevertheless, the court delivered its original opinion on May 13, 1963. Following this Court's disposition of the *Avent*, *Peterson* and *Lombard* cases the Supreme Court of Arkansas entertained a petition for rehearing and on June 3, 1963 denied rehearing (R. 134-135; appendix, *infra*, p. 17a) on the ground that there was no evidence that "the decision of the Manager in the case at bar to exclude these petitioners from the lunch room was anything except the exercise of freedom of choice" (R. 135; appendix, *infra*, p. 18a).

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court. This Court now has under consideration several cases presenting substantially identical issues. *Griffin* v. *Maryland*, No. 6, cert. granted, 370 U. S. 935, set down for reargument, 373 U. S. 920; *Barr* v. *City of Columbia*, No. 9, cert. granted,

374 U. S. 805; *Bouie* v. *City of Columbia*, No. 10, cert. granted, 374 U. S. 805; *Bell* v. *Maryland*, No. 12, cert. granted, 374 U. S. 805; *Robinson* v. *Florida*, No. 60, probable jurisdiction noted, 374 U. S. 803.

I.

Petitioners Convictions Enforce Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

Indusputably, petitioners convictions in this case rest upon and constitute racial discrimination against them. Petitioners are Negro students who, at the very worst,[5] sat at food service counters and tables insisting upon service which was refused pursuant to the establishment's racially exclusionary policies.

In the words of Mr. Holt, the manager of Blass Department Store, "I went to the balcony lunch room during the lunch hour and observed there were five negro boys sitting in the lunch room, three of them at the counter and two of them at tables. I told each one of them in turn that I didn't want any disturbance, but I did ask them to leave" (R. 65). It mattered only that they were "Negro" boys. Their conduct, dress, and demeanor were above reproach (R. 39, 48, 59, 68), and they were welcome—as they had always been before—in other departments of the store (R. 86, 91). But because they were Negroes and they were requesting service in the lunchroom, they were asked to leave.[6]

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[5] Petitioner Robinson denied that he ever sat down in the lunch room (R. 89).

[6] The record contains no explicit acknowledgment by store personnel that the lunchroom was operated exclusively for white customers but the entire record is inconsistent with any contrary proposition. The Supreme Court of Arkansas said, "The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes (R. 118; appendix, *infra*, p. 3a).

Clearly, then, this case involves discrimination based on color, "simply that and nothing more" (*Buchanan* v. *Warley*, 245 U. S. 60, 73), and it is no longer arguable that such discriminations by government are valid. Racial discriminations have been held repeatedly to violate the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1; *Goss* v. *Board of Education*, 373 U. S. 683; *Peterson* v. *City of Greenville*, 373 U. S. 244,

The doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1, is clearly applicable. Unless that case is to be overruled (or, what is the same thing, irrationally "confined to its own facts"), it is settled law that there are some cases in which the "state action" requisite for invocation of the Fourteenth Amendment is to be found in the use of the judicial power to enforce a privately-originated scheme of racial discrimination.

It is unthinkable that *Shelley* is to be overruled. It has been followed and approvingly cited in this Court.[7] It is unlikely that there is now much disagreement with its broader principle; who, for example, would now think it right to uphold the action of a state court in ordering specific performance, by one restaurateur who wanted to desegregate, of an agreement among all the restaurateurs in a town to retain segregation? Yet such an injunction, absent the Fourteenth Amendment, would be well within the equity categories governing the administration of the

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[7] *Trustees of the Monroe Avenue Church of Christ* v. *Perkins*, 334 U. S. 813 (1948).
Barrows v. *Jackson*, 346 U. S. 249 (1953).

[8] *Hurd* v. *Hodge*, 334 U. S. 24, 33 (1948).
Cooper v. *Aaron*, 358 U. S. 1, 17 (1958).

private-law remedy of specific performance, as a state might choose to develop them.

As Professor Henkin, one of the most thoughtful analysts of *Shelley* has said: "*Shelley* v. *Kraemer* was not wrongly decided. It is not a special case. It need not be rejected; it need not be narrowly limited." Henkin, "*Shelley* v. *Kraemer*: Notes For A Revised Opinion," 110 U. Pa. L. Rev. 473, 491 (1962).

But if the *Shelley* principle has living force, it is hard to see why it should not apply here. This case is stronger than *Shelley*. In *Shelley*, the state action immediately involved consisted (aside from the furnishing of recordation machinery) in keeping the courts open for the filing of complaints that asked injunctive relief, in granting such relief when asked by a private party, and in standing by with the contempt machinery for use in the event the private party might invoke that machinery. In this case, the police were readily available nearby and made the arrests after the conduct complained of had ceased. The public prosecutor, supported by the public fisc, carried the case to court. Most crucially, the case was a criminal prosecution, in which the state appears as a party, *in its own interest*, in knowing support of the discriminatory scheme, which it thereby sanctions within the public order of its criminal law, and not merely within the framework of its dealing with private rights. The State of Arkansas has taken on this case as its own from the first policeman's intervention to the last argument in this Court; it must be a paradoxical distinction indeed which could find "state action" in the private-law umpiring performed by the state in *Shelley* v. *Kraemer*, and not find it here.

It has been urged that *Shelley* involved contract rights, while this case involves property rights; but this distinction,

aside from its obvious unviability in the robust air of a constitutional context, is not even descriptively accurate, for the covenant that runs with the land creates a kind of property interest, described in the state court's opinion in a companion case to *Shelley*, as "reciprocal negative easements."[9] Substantially, the right asserted in *Shelley* was more weighty than that asserted here; if one really dislikes Negroes, having a Negro as a next-door neighbor is more disagreeable than selling a Negro a sandwich—or, more accurately, having to endure his sitting and ordering a sandwich.

It is asserted that the state is not enforcing racial discrimination, but implementing a property right. The distinction is a false one; the state is enforcing racial discrimination *by* implementing a property right, just as in *Shelley* the state was enforcing racial discrimination by implementing a contract right which was also a property right.

In addition to its action in arresting these petitioners, prosecuting them in its courts, and condemning them to jail, the State of Arkansas bears responsibility for the enforcement of racial discrimination because the property owner formulated his discriminatory policy in obedience to a widespread custom which has been confirmed and maintained by state law. Where the individual act of segregation is performed substantially under the influence of a statewide public custom of segregation, and where this widespread public custom has in turn been substantially supported by formal state law, then the act of segregation is infected with state power.

The unfolding of this proposition requires a few words. First, its submission is that where the causal connection

[9] See record in U. S. Supreme Court in *McGhee v. Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51.

of the segregation with custom is *substantial*, and not only where that connection amounts to practical coercion, the required nexus is present; similarly, where state law has *substantially* supported the custom of segregation, and not only where it is the sole force behind that custom, state action is traceable in the custom. These propositions are conformed to the *Civil Rights Cases* statement that "some" state action is enough (109 U. S. 3, 13) as well as with the "significant extent" criterion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

Secondly, there is no principled reason for finding state action only in those cases where state law presently in force supports the segregation custom; states, like men, are to be charged with the consequences of what they do, even when those consequences follow after the act that produced them is finished, or even repented. The maintenance for generations of a *de jure* segregated regime has its consequences after the laws are changed, and the rules of "state action" ought to give effect to this obvious social truth. The purpose of tracing out this chain of causation is not the penalization of the present state officials, but the resolution of the issue whether in fact state power is a substantial factor in the discrimination complained of.

Thirdly, it is not dispositive of the question of the causal nexus between state law and state custom to show that the segregation code of the state did not contain a provision specifically commanding the very sort of segregation involved in the case. A reasonably comprehensive segregation code surely contributes to some extent to the likelihood that segregation will be observed as a general custom even where that code does not specifically command it.

It remains to deal with questions of burden of proof. Two issues are important: (1) If it appears that a custom of segregation exists, and that a proprietor segregates in

factual conformity to that custom, on whom should the burden rest with respect to the issue of his being to some extent influenced by the custom? (2) If it appears that a custom of segregation exists, and it further appears that the state in question has in force or until recent times has had in force a system of legal dispensations sanctioning segregation, on whom should the burden rest with respect to the issue of substantial causal connection between the custom and that legal regime?

9 Wigmore, *Evidence* (3d ed., 1940) §2486, states the general rule on the allocation of the burden of proof: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." And, again, ". . . [T]his apportionment depends ultimately on broad considerations of policy . . ." *id.*, §2488.

It is not doubtful where these considerations lead, with respect to the two numbered questions just put.

As to the first: It can surely be recognized by this Court, as a broad fact of human nature, that men are rarely wholly isolated from the settled customs of their communities, and that the notion of a man's acting in exact conformity to custom, but without being influenced in any substantial way by the existence of the custom, is virtually a paradox. If this be doubted in the general case, surely it cannot be doubted in the case of the proprietor catering to the public; his business success may depend on his conformity to community custom. And of course the business motive of pleasing his customers by conformity is not a *different* motive from conformity to custom, but that very motive itself, in one of its varieties of incidence. Given these facts, which it is hard to think anyone will care seriously to dispute, it is plain that the burden of proof, and a very heavy

one, ought to be placed on the assertor of the proposition that some individual is that *rara avis*, a man who is in business catering to the public, and who factually conforms to public custom, but who does so *solely* from self-generated causes, and without any reference to the custom's existence.

As the second numbered question, the case seems equally plain, particularly in the light of the broad history of segregation. There is good, historic ground for the belief that the segregation system was brought into being or at least licked into shape, by state law. See Woodward, *The Strange Career of Jim Crow* (1957), 16-22, 81-85, 91-93, *et passim*. Against that historic background, the issue is whether one should have to prove that custom was to some extent the function of law aimed at structuring the custom, or whether the opponent should have to prove that it was not. It is clear that the *total* lack of such a causal relation is the thing for which proof should be required. And it should be especially noted that, in cases such as the present, the assertor of the proposition that no causal relation exists between law and custom, that they have moved in a Cartesian parallelism, is the very state that maintained the legal provisions, now perceived to be unconstitutional, that were aimed at shoring up the custom; surely something not far from estoppel should at the least prevent the state's benefiting from the assumption that its own efforts were vain, without even adducing proof. Cf. *Peterson* v. *Greenville*, 373 U. S. 244, 248: "The State *will not be heard* to make this contention in support of the convictions." (Emphasis supplied.) Cf. also Mr. Justice Harlan's concurrence in the same case, 373 U. S. at 252.

If these substantive and evidentiary principles are right, their application to the instant case is plain. This Court will hardly require citation to the propositions that the State of Arkansas, and the City of *Cooper* v. *Aaron*, *supra*,

has a public custom of segregation of the races, and has fostered and maintained that custom by law.[10] Any denial that segregation is at least in substantial part the doing of the state is an assertion that the deepest policies and most comprehensive laws of the state have been mere works of supererogation. The state ought at least be required to prove such a strange assertion. The natural inference, from the roughest knowledge of the recent history of Arkansas is that segregation in public places such as that involved in this case, takes place substantially because a state-wide public custom, supported by state laws abandoned only under extreme pressure, commands that it shall take place.

Moreover, even if either the state-created custom or the use of state police, prosecutor, attorney-general and courts be in itself an insufficient element of state action, nevertheless, in co-action, they are indisputably sufficient. This record, in a social context that is a matter of common knowledge, presents the picture of a segregation performed in obedience to a custom which is at least in substantial part a creature of state law; the action so motivated is then supported and enforced by prosecutions conducted by state officials, and by convictions in state courts. If "state action" is not to be found in such cases, then the "state action" concept has suffered some weird transformation from the coordinates of reality, and can be of no use in the process of adjusting constitutional interests. One need not doubt what the judgment of history will be

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[10] State law requires segregation in penal institutions (Ark. Stat. §§46-122, 46-144 to 46-147, 46-323 (1947)); and polling places (Ark. Stat. §3-910 (1947)); on motor carriers (Ark. Stat. §73-1747 to 73-1753 (1947)); and electric and street railroads (Ark. Stat. §73-1614 to 73-1619 (1947)); and in schools (Ark. Stat. §80-509, 80-544 to 80-547. (1947)). Ark. Stat. §6-817 to 6-824 (1947), requiring registration of persons promoting integration was held unconstitutional, *Smith* v. *Faubus*, 327 S. W. 2d 562 (1959).

on the proposition that the political power of the former segregating states is to no significant degree engaged in the present struggle.

It is true that the Fourteenth Amendment applies only to those actions in which state power is to some significant degree involved. Here, state power is involved to a significant degree in the racial discrimination practiced upon the petitioners because the state's regime of laws has failed to furnish protection from discrimination to petitioners.[11] The State's role here is not neutral; it has preferred the discriminator's insubstantial property claim to the petitioners' claim of equality. The Fourteenth Amendment overrides this state choice, for equal protection of the laws requires the states to protect the Negroes' claim of equality. *The Slaughterhouse* cases; 83 U. S. (16 Wall.) 36, 70-73; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

Finally, it is submitted that acceptance of the arguments advanced above need not foreclose protection of the genuinely private and personal choices of man. The substantive guarantees of the Fourteenth Amendment clearly protect petitioners from the state action involved in this case, but those guarantees are susceptible of reasonable interpretation. See Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962). By careful interpretation, they can be limited in future cases to their incidence upon public life without any undesirable application to the truly private concerns of man.

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[11] This Court has long recognized that certain crucial abdications of governmental power—sometimes explained as affirmative decisions by government not to act—can make government responsible in the 14th Amendment sense. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461; *McCabe* v. *Atchison, Topeka & S. F. Ry.*, 235 U. S. 151.

II.

The Record Indicates That There Were Special Circumstances of Police Involvement in the Racially Discriminatory Scheme Which Would in Themselves Establish State Action in Violation of the Fourteenth Amendment.

Officer Baer of the Little Rock Police Department testified that on the morning of April 13, 1960 he was working his beat in the vicinity of the Blass Department Store when he observed a group of Negroes walk into the store (R. 49, 50). As he declared on the stand,

> "some went in the front door and some went in the Fourth Street side and I knew they were these sit-downers they have been called because most of them had their badges on and I followed them in and observed them sitting down upstairs" (R. 50).

After identifying petitioner Robinson as one of the group,[12] Officer Baer said, "I proceeded down and called headquarters and advised them" (R. 51). "They sent the Lieutenant and the Captain down there, talked to Mr. Trianfonte of the Blass store. He advised us of the situation there" (R. 51-52).

Officer Baer also testified that while observing the sit-in, "I talked to the store employee. I don't know his name and he advised he was waiting for the manager at the time" (R. 53). When asked whether he was present when any store employee had conversed with the demonstrators, the policeman said, "No, sir, I wasn't" (R. 52). When asked whether he had seen the demonstrators leave, he replied,

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[12] At one point, Officer Baer indicated that both petitioners were among the sit-in group (R. 52).

"When I came back outside from using the phone and the wagon had driven up and several police cars, they were beginning to come out."

None of Officer Baer's testimony is directly controverted by the prosecution's other witnesses. There is, of course, strong controversion of the state's version that the policemen were merely performing their ordinary duties when the store manager and his assistant rushed across the street for protection.

Officer Baer's testimony that he talked to a store employee when the demonstrators sat down clearly indicates that he was making every effort to insure that any possible offense would clearly fall within the words of this carefully worded "trespass" statute. This is a far cry from the mere neutral use of state machinery to enforce private discriminatory choice. Cf. *Lombard* v. *Louisiana, supra*; *Peterson* v. *City of Greenville, supra.*

CONCLUSION

Wherefore, for the foregoing reasons, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Court of Arkansas

SUPREME COURT OF ARKANSAS

Nos. 4992, 4994, 4997

CHESTER BRIGGS, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee,

Consolidated with

EUGENE D. SMITH, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee,

Consolidated with

JAMES FRANK LUPPER, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

Opinion Delivered May 13, 1963

APPEAL FROM PULASKI CIRCUIT COURT,
HON. WILLIAM J. KIRBY, JUDGE.

REVERSED AND DISMISSED IN PART.
AFFIRMED IN PART.

JIM JOHNSON, *Associate Justice*:

These are the so-called "sit-in" cases. They were submitted to this court on January 16, 1961. At that time there were cases claimed to be similar pending in other states.[1] By common consent our decision was delayed awaiting the outcomes of cases then pending in which petitions for certiorari to the United States Supreme Court had been filed. Since then additional petitions have been filed and there are now pending before the United States Supreme Court at least three cases of this nature in which certiorari has been granted. See *Avent* v. *North Carolina*, cert. 370 U. S. 934; *Peterson* v. *City of Greenville*, *cert.* 370 U. S. 935; *Lombard* v. *Louisiana*, 370 U. S. 935. We were particularly interested in the outcome of the "Garner cases", *Garner* v. *Louisiana*, 368 U. S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207, which appeared to be in point with the cases at bar. From the opinion of the United States Supreme Court in these cases, which were decided December 11, 1961, it developed that the cases did not involve a situation similar to ours and therefore afforded no persuasive authority.

While we originally intended to delay our decision until the United States Supreme Court had decided a case in point with ours, it is against our policy to delay for too long our decision in any pending case. We ascribe to the theory that justice delayed is justice denied. For many

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[1] *Henderson* v. *Trailways Bus Co.* (Va.), 194 F. Supp. 423; *Randolph* v. *Commonwealth* (Va.), 119 S. E. 2d 817; *State* v. *Williams* (N. C.), 117 S. E. 2d 824; *Samuels* v. *State* (Ga.), 118 S. E. 2d 231; *Briscoe* v. *State* (Tex.), 341 S. W. 2d 432; *Walker* v. *State* (Ga.), 118 S. E. 2d 284; *State* v. *Fox* (N. C.), 118 S. E. 2d 58; *Rucker* v. *State* (Tex.), 342 S. W. 2d 325; *Burton* v. *Wilmington (Del.) Parking Authority*, 365 U. S. 715; *Williams* v. *Hot Shoppes, Inc.*, C. A. D. C., April 20, 1961, No. 15610; *Gober* v. *City of Birmingham* (Ala.), 133 So. 2d 697.

years when this court goes into summer adjournment all cases ready for submission have been decided except some rare case like these which is carried over for a definite reason. These cases have now been pending for over two years. We do not feel that we can properly delay them longer to await a decision of the United States Supreme Court. In order to avoid carrying these cases over another summer we now proceed to a decision.

Our cases here were consolidated.[2] They consisted of three criminal prosecutions against 13 defendants. The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes. The three cases involve separate incidents at separate retail establishments. There are factual and legal differences necessitating a different disposition of the cases of one group of appellants as compared to the other two groups.

Case No. 4992, styled *Briggs et al.* v. *State*, is a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at F. W. Woolworth Company in Little Rock on March 10, 1960.

Case No. 4994, styled *Smith et al.* v. *State*, is also a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at Pfeifers Department Store in Little Rock on April 13, 1960.

Case No. 4997, styled *Lupper et al.* v. *State*, is a prosecution under Act 226 and also under Act 14. It involves a "sit-in" at the Gus Blass Store in Little Rock on April 13, 1960.

In the *Briggs* case, the evidence shows that the Negro defendants seated themselves at a lunch counter in Woolworth's and refused to leave when ordered to do so by

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[2] The cases were consolidated for briefing upon motion of appellants.

police officers. The evidence is undisputed that these defendants were not requested to leave by the management or by anyone with authority to act for the management.

In the *Smith* case, the record shows that all defendants but one left the premises promptly upon the request of the manager.

The *Lupper* case was tried to a jury and there is adequate evidence on behalf of the State to support a finding that these two defendants, James Frank Lupper and Thomas B. Robinson, refused to leave the Gus Blass Store at the request of the manager.

ACT 226 CASES

We see no distinction in fact or law between the three prosecutions under Act 226 of 1959. Therefore, we will discuss the three cases together insofar as Act 226 is concerned. Of course, it will be necessary to discuss the prosecution under Act 14 separately.

For reversal of the Act 226 cases, it is insisted that:

(1) The Act is unconstitutional because it denied defendants due process and equal protection of the law.

(2) The Act has been applied in an unconstitutional manner.

(3) The evidence was insufficient to support a conviction; and,

(4) The judgment was excessive and harsh.

Since we are of the opinion that Point 3 is well taken,[3] we will not pass upon the constitutionality of Act 226 of

[3] It is noted that these appellants were charged and convicted of a violation of Act 226 of 1959 exclusively and not for a violation of the prohibitions contained in Ark. Stats. §41-1401 or §41-1403, the general disturbance of the peace statutes.

1959. This is in accordance with the established rule of this court that constitutional questions will not be decided where the case may be disposed of on other grounds. *Bailey* v. *State*, 229 Ark. 74, 313 S. W. 2d 388; *Bowling* v. *State*, 229 Ark. 876, 318 S. W. 2d 808.

Section 1 of Act 226 of 1959 [§41-1432 Ark. Stats.] reads as follows:

> "Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment."

Under this Act the prohibited offenses are creating disturbances or breaches of the peace. The Act sets forth loud and offensive talk, the making of threats and attempts to intimidate as examples of prohibited conduct. While there was some evidence on the part of the State to the effect that feeling and tension were high, the State offered no substantial evidence that these defendants entered the store to carry out a conspiracy to cause a breach of the peace, nor was there evidence that these defendants or any of them uttered any loud offensive talk, made any threats or attempted to intimidate anyone. The defendants had a

right to peacefully seek service at the lunch counters. By the same rule, management had a right to refuse to serve them. Since the peaceful efforts of the defendants to get service at the lunch counters were lawful, and in the absence of a substantial showing that such efforts were organized and calculated to disturb or breach the peace, it cannot be said here that the mere making of these efforts amounted to "creating a disturbance or breach of the peace." It is obvious that the Act contemplates a doing of that which the actor has no legal right to do. The defendants in the *Briggs* case refused to leave at the command of the police officers but in the absence of a request by management of the officers to order appellants to leave the premises, the officers had no right or authority to give such orders. There is no contention in this case that the officers had received such a request from management. Hence, the refusal of the defendants to leave was not unlawful and could not have been unlawful until they refused to leave at the request of the management or the officers in compliance with a request from management. In the *Smith* case all defendants but one left promptly at the request of the management. Certainly those leaving were guilty of no offense. The case of the one individual (in the *Smith* case) who did not leave promptly gives us more concern. However, we are constrained to believe that any unrest, tension or disturbance existent in the Pfeifer store at that time had already been created by the lawful efforts of all the defendants to obtain service. There is no showing that this act of the defendant created a disturbance or breach of the peace. A different question would be presented had this defendant been prosecuted under Act 14 of 1959 but no such charge was placed against him.

The point which we wish to make completely clear is that the mere fact that the exercise of a lawful right may

result in a disturbance or breach of the peace does not make the exercise of that right a violation of the law so long as the right is exercised in a peaceful manner and without force or violence or threats of same. Therefore, we conclude that all defendants in all prosecutions under Act 226 of 1959 should have been acquitted.

In the *Lupper* case, which involves violations of Act 14 of 1959, as well as violations of Act 226, the appellants make the same contentions as to Act 14 as are made as to Act 226 and an additional point is raised as to alleged error in refusing to give certain instructions.

DUE PROCESS & EQUAL PROTECTION OF LAWS

Section 1 of Act 14 of 1959 [§41-1433 Ark. Stats.] reads as follows:

> "Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Appellants assert that Act 14 is unconstitutional in that it denies them equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article II of the Constitution of Arkansas, and cite *United States* v. *Miller*, 17 F. Supp. 65; and *Lanzetta* v. *New Jersey*, 306 U. S. 451, —— Sup. Ct. — —, 83 L. Ed. 888. It is contended

that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the owner or manager a misdemeanor.

It is suggested that the Act could be construed so as to allow an owner or manager to invoke the same because a customer was demanding a refund of money paid for merchandise or because a customer was demanding a delivery of merchandise which he had purchased. Assuming this to be true, we see no reason why the Act amounts to a denial of due process or equal protection of the laws. To remain upon the premises of another after having been requested to leave amounts to a trespass. *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295. This does not mean that under the hypothesis suggested by appellants that the aggrieved customer would have no remedy because if management had failed to return his money or deliver merchandise purchased, an action would lie in the courts of this State and the customer could be fully compensated for the failure to return the money or deliver the merchandise. A bill collector has a right to attempt to collect what is due him but he has no right to commit a trespass in the process.

By its terms and on its face, the statute applies to all who refuse to leave and it is not restricted to negroes. There is nothing uncertain, indefinite or vague about Act 14. It prohibits trespass.

While the Legislature and not this court determines public policy by statutory enactments, we feel that it is a wise policy to prevent possible violence and bloodshed by

providing criminal sanctions against trespass. We have held that a citizen of this State may use force and violence short of killing to protect his property against trespass even though the trespasser makes no effort to commit a felony. *Carpenter* v. *State*, 62 Ark. 286, 36 S. W. 900. The statute here in question simply provides a means whereby the owner of property may be protected in his use and possession of such property without having to resort to force and violence. We are impressed with the proposition that without this salutary statute, violence in repelling trespassers could become commonplace. Certainly, it is in the interest of the public and a valid exercise of the police power to protect the public peace by criminal sanction against trespass. Article 2, §22 of the Constitution of Arkansas in part is as follows:

> "The right of property is before and higher than any constitutional sanction. . . ."

The right to hold and enjoy property free from interference by others is one of the most precious rights enjoyed by the citizens of this State. They are entitled to be protected in this right against all trespassers without regard to whether they are colored or white.

The appellants complain that the Act does not require any *mens rea* or criminal intent on the part of the offender. We again disagree; the intent to remain after being requested to leave is a criminal intent.

Unconstitutional Application of Act 14

The appellants contend that Act 14 has been unlawfully and unconstitutionally administered because it is said that the Act would not be invoked or enforced against a white man under the same or similar circumstances, thereby deny-

ing appellants equal protection of the laws. There is absolutely no evidence in the record to justify such an assertion. On its face the Act is applicable to all persons without regard to race. Appellants made no effort to adduce evidence to prove that white persons had violated the Act; that these violations were known to the officers and prosecuting authorities and that no arrests and prosecutions had followed such violations. Such proof would have been necessary in order to justify the present contention. See: *Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 679, certiorari denied, 352 U. S. 894, 77 Sup. Ct. 125, 1 L. Ed. 2d 85; also see: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Snowden* v. *Hughes*, 321 U. S. 1, 64 Sup. Ct. 397, 88 L. Ed. 497; *Hickinbotham* v. *State*, 227 Ark. 1032, 303 S. W. 2d 565.

The appellants have not shown, nor have we been able to find from the record, a single discriminatory act on the part of the State in the enforcement of this statute. It is not unusual for persons charged with crime to assert "discrimination", however, unsupported assertions cannot be held to take the place of evidence.

STATE ACTION

Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia*, *Shelley* v. *Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge*, 334 U. S. 24, 68 Sup. 847, 92 L. Ed. 1187; *Barrows* v. *Jackson*, 346 U. S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586; and *Valle* v. *Stengel*, 176 F. 2d 697. This argument is completely untenable because it presupposes a right in the Negro defendants to be served by the lunch

counter operators. In all of the cited cases from the Supreme Court of the United States it is either assumed or specifically stated that the Negroes involved had a right to own and occupy the property in question. In the *Valle* case, the State of New Jersey had enacted a statute giving all persons, irrespective of color, the right to admission of places of public accommodation such as the swimming pool there in question.

There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accommodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants.

Appellants place great reliance on the language in *Valle* v. *Stengel*, *supra*, with reference to the right to contract. However, a reading of the *Valle* case shows that the court merely held that the Fourteenth Amendment and the Federal Civil Rights Statutes only guaranteed to Negroes "a civil status equivalent to that enjoyed by white persons." As previously mentioned, New Jersey had a "public accommodation" statute guaranteeing to all persons, regardless of color, the right to admission to the swimming pool in question. This is considerably different from the situation in the case at bar. Arkansas has no "public accommodation" statute. Management can arbitrarily order white persons to leave lunch counters for any reason whatever. While appellants expound forcefully of the equal privileges and immunities provisions of the Fourteenth Amendment, we cannot escape the conclusion that they are urging this court to grant them an unequal privilege, that is the right to be served in a restaurant because they are colored, even though a corresponding right does not exist in white per-

sons. Appellants' argument must fail because they, regardless of color, had no right or privilege to be served. To hold otherwise would be to employ judicial fiat to coerce unwilling lunch counter operators to afford service to patrons they do not want and did not seek. It can add nothing to the argument to say that they did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing the criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States. There is no privilege or immunity to trespass on private property. It should be remembered that the operators of the lunch counter in question have a right not to be deprived of their property without due process of law. This right is guaranteed to them under the same provisions of the Constitution now sought to be invoked by appellants. To hold that anyone may trespass at will simply because his color is different from that of the property owner and that the law is powerless to protect the injured party would be inviting property owners to provide their own means of evicting trespassers. This would not be consonant with the principles of a nation which regards good order as one of the fundamental objectives of society. The Supreme Court of the United States has approved a municipal ordinance designed to prevent trespass by providing that it should be unlawful for magazine subscription solicitors to go upon private property for the purpose of soliciting orders without having been requested or invited to do so. *Breard* v. *Alexandria*, 341 U. S. 622, 71 Sup. Ct. 920, 95 L. Ed. 1233. In the *Breard* case the court rejected arguments of the appellant solicitor that the ordinance violated: (a) The due process clause of the Fourteenth Amendment; (b) The

Federal Commerce Clause; (c) The guarantees of the First Amendment of freedom of speech and the press (made applicable to the states by the Fourteenth Amendment).

In the *Breard* case the court said:

> "Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, *Hall* v. *Virginia* does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 1247, a City Council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass upon private grounds after notice. Thus, the *Marsh* and *Tucker* cases are not applicable here."

We think the quoted language makes it abundantly clear that the act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment. The same language also makes it clear that in prosecuting for trespass the State is making a valid exercise of police power. In other words, it makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination.

SUFFICIENCY OF EVIDENCE IN LUPPER CASE

As previously mentioned, there was sufficient evidence to support the verdict of the jury in finding that the defendants Lupper and Robinson refused to leave the premises after having been requested to do so by the manager.

It is not our province to pass upon the weight of the evidence. It requires no citation of cases as to the familiar rule that we may not go behind the verdict of a jury which is supported by substantial evidence.

REFUSAL OF REQUESTED INSTRUCTIONS

The appellants complain of the action of the trial court in refusing to give two instructions requested by them. However, a comparison of the instructions which were refused with those which were given by the court makes it crystal clear that the subject matter of the rejected instructions was adequately covered by the instructions given. *Harrison* v. *State,* 222 Ark. 773, 262 S. W. 2d 907.

EXCESSIVENESS AND HARSHNESS OF JUDGMENT

The appellants contend that the fines and punishment meted out to them were excessive and harsh even though they did not exceed the penalties provided by Act 14. This contention has been rejected many times by this court. See: *Johnson* v. *State,* 214 Ark. 902, 218 S. W. 2d 687.

CONCLUSION

For the error indicated, the convictions under Act 226 of 1959 are reversed and the cases having been fully developed are dismissed.

The convictions of Lupper and Robinson under Act 14 of 1959 are affirmed.

Robinson, J., dissents in part; Holt, J., disqualified.

Judgment of the Supreme Court of Arkansas

IN THE SUPREME COURT OF ARKANSAS

October Term, 1962—May 13, 1963

CHESTER BRIGGS *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

Appeal from Pulaski Circuit Court, First Division

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, First Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that so much of the proceedings and judgment of said circuit court involving the convictions of appellants Lupper and Robinson under Act 14 of 1959 should be affirmed.

It is, therefore, considered by the Court that so much of the judgment of said circuit court in this cause rendered be, and the same is hereby, affirmed.

But it is further the opinion of the Court that there is error in so much of the proceedings and judgment of said circuit court in this cause which upheld the convictions of all the appellants under Act 226 of 1959.

It is, therefore, considered by the Court that so much of the proceedings and judgment of said circuit court be, and

the same is hereby, reversed, annulled and set aside; and that this cause be dismissed.

It is further considered that said appellants recover of said appellee all their costs in this Court, in this cause expended. ROBINSON, *J.*, dissents in part; HOLT, *J.*, disqualified.

May 13, 1963

Supplemental Opinion of the Supreme Court of Arkansas Denying Rehearing

SUPREME COURT OF ARKANSAS

No. 4997

Opinion Delivered June 3, 1963

JAMES FRANK LUPPER, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

On Rehearing

Rehearing denied

JIM JOHNSON, *Associate Justice*

Subsequent to the opinion delivered by this court in *Lupper* v. *State* on May 13, 1963, the United States Supreme Court on May 20, 1963, rendered opinions in four "sit-in" cases the pendency of which was specifically referred to in our opinion as cases in the nature of and similar to the cases at bar. The four cases are *Avent* v. *North Carolina*, #11; *Peterson* v. *City of Greenville*, #71; *Lombard* v. *Louisiana*, #58; and *Gober* v. *Birmingham*, #66.

Within the time prescribed by the rules of this court, appellants have petitioned for a rehearing urging reconsideration of our opinion in the light of these recent pronouncements of the United States Supreme Court.

A careful examination of copies of the official opinions in these cases furnished us by the Government Printing

Supplemental Opinion of the Supreme Court of Arkansas Denying Rehearing

Office discloses that the court (in *Lombard* v. *Louisiana*, #58) summarized its own holdings as follows:

> "We have . . . held . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat white and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."

In compliance with petitioners' request for review, we have reexamined our opinion in the light of the cited cases and find that appellants did not claim nor was there any showing made relative to the existence of a state law or municipal ordinance in the City of Little Rock which made it unlawful for owners or managers of restaurants or lunch counters to seat whites and Negroes together. Further, appellants did not claim nor was there any showing made that any official command was issued which could remotely have the coercive effect of a law requiring segregation of the races in restaurants or lunch counters. In fact, from our assiduous review of the entire record before us, we have been unable to find any claim, evidence or showing indicating in the slightest respect that the decision of the manager in the case at bar do exclude these petitioners from the lunch room was anything except the exercise of freedom of choice. Having thus reviewed our opinion in the light requested, rehearing is denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 5

FRANK JAMES LUPPER, *et al* ..... *Petitioners*

v.

THE STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 432

FRANK JAMES LUPPER, *et al* ..... *Petitioners*

v.

THE STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas (Appendix of Petition) is reported at 236 Ark. 596, 367 S.W. 2d 750 and the opinion of that court on petition for rehearing (Appendix of Petition) is found at 367 S.W. 2d 760.

JURISDICTION

The jurisdictional requirement is adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the enforcement of a criminal statute pertaining to trespass by the State of Arkansas comes within the purview and is violative of the Fourteenth Amendment of the Constitutionn of the United States.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

ARKANSAS STATUTE INVOLVED

The issue of this litigation is the constitutionality of Act 14, Acts of Arkansas of 1959, codified as Arkansas Statutes Annotated §41-1433 (1961 Supp.) which prohibits a person to remain on the premises of a business establishment after having been requested to leave by the owner or manager of the establishment.

STATEMENT

The petitioners, Frank J. Lupper and Thomas B. Robinson, were prosecuted and convicted for the violation of trespass which occurred at a privately owned business establishment in Little Rock, Arkansas.

Aside from certain controversial aspects, the statement contained in the Petition is a fair and concise summary of the circumstances surrounding the incident.

It should suffice for purposes here to note that petitioners were a part of a group of 12 to 15 persons wearing badges who entered Gus Blass & Company, a department store, at noon on April 13, 1960. The group proceeded to the mezzanine tea room where petitioners and some others of the group sat down at the counter and tables. Within a few minutes, both petitioners were advised by store officials, the manager and assistant superintendent, that Blass reserved the right to refuse service to anyone and was not prepared to serve petitioners. The petitioners were then requested to leave. Although the petitioners were not boisterous, they attempted to argue with the store personnel and refused to leave the premises. The city police were summoned and the petitioners were arrested for violation of Act 14 of the Acts of Arkansas of 1959, codified as Arkansas Statutes Annotated §41-1433 (1961 Supp.).

The petitioners were tried and convicted of the offense in the Criminal Division of the Little Rock Municipal Court. The convictions were appealed to Pulaski Circuit Court where a trial de novo by jury resulted in verdicts of guilty. The Arkansas Supreme Court affirmed the convictions and subsequently denied petitioners' application for rehearing.

ARGUMENT

Respondent submits that the petition does not disclose any substantial issue and the record in this case fails to support the conclusion of deprivation of any right made available by either the Constitution of the United States or the Constitution of Arkansas. The convictions affirmed by the Arkansas Supreme Court are in concert with both the spirit and letter of the most recent decisions rendered by this Court and the fundamental principles of the common law.

In order to facilitate both brevity and clarity of the questions, respondent has attempted to follow the organization of petitioners' brief as closely as possible.

I

Act 14 is Constitutional as Enacted and Applied

A. The Convictions Rest Upon Evidence of Trespass

Initially petitioners argue that their convictions constitute nothing more than racial discrimination. During their trial, they steadfastly maintained that, without any preconceived arrangement, each had individually decided to go to Blass to have lunch. Thus, pure happenstance brought approximately twelve students wearing identifying badges from a local college to the doors of a department store simultaneously to flood the mezzanine tea room. This visit was apparently the first for each of the group. It was no wonder that the prosecutor expressed some skepticism when the petitioners denied having any knowledge of the identity of any of the others in

the demonstration. The evidence adduced at trial was not only beyond a reasonable doubt as to each essential element of the offense; it was overwhelming.

To support their contention, petitioners rely entirely upon a quoted portion of the testimony of the manager of Blass with the erroneous conclusion that the only reason the petitioners were asked to leave was that they were Negroes (p. 8 of Petition). The one compelling reason expressed by the manager was that he did not "want any disturbance" (R.65). In answer to petitioners' question concerning *Shelley* v. *Kraemer*, 334 U.S. 1, a store manager having a public disturbance in the store whether it be caused by a group of Negroes or Caucasians is more disagreeable than having a Negro as a neighbor or eating with a Negro. The record in this case discloses that a disturbance was well under way involving both ethnic groups which was just what the manager was seeking to avoid. Since it was the demonstrators' avowed purpose to cause a disturbance, the manager's action was not only reasonable, but laudable.

B. The Private Prerogative

Conceding *arguendo* that the basis of the exclusion of petitioners by Blass was solely race, there was no violation of constitutional rights. It is well settled that an individual may discriminate as he sees fit. *The Civil Rights Cases*, 109 U.S. 3; *Burton* v. *Wilmington Parking Authority*, 265 U.S. 715; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir.); *Griffin* v. *Collins*, 187 F. Supp. 149; *Avent* v. *North Carolina*, 373 U.S. 375; *Gober* v. *City of Birmingham*, 373 U.S. 277; *Lombard* v. *Louisiana*, 373 U.S. 267; *Peterson* v. *City of Greenville*, 373 U.S. 244.

C. State Action

It is conceded that probably most discrimination by government is not valid. *Brown* v. *Board of Education*, 347 U.S. 483; *Buchanan* v. *Warley*, 245 U.S. 60; *Cooper* v. *Aaron*, 358 U.S. 1; *Peterson* v. *City of Greenville*, *supra*. The critical question posed is: Has the State of Arkansas enforced racial discrimination? The answer appears as obvious to respondent as it does to petitioners although contrary conclusions are reached.

First, the doctrine of *Shelley* cannot be invoked to control the issue in controversy, for there is no legal or factual analogy with the case at bar. It is certainly doubtful that *Shelley* will ever be overruled, but the holding there will not be diminished in any respect if petitioners' convictions are allowed to remain undisturbed. Petitioners compare *Shelley*, at page 9 of the Petition, by asking who would think that a state court could require specific performance of a restaurateur who wanted to desegregate in derogation of an agreement of all of the restaurateurs in the community to remain segregated. To point the falicy of this, it would not be proper for that state court, or a federal court for that matter, to order specific performance in compliance to an agreement to integrate by a restaurateur who desired to remain segregated.

Second, the fact that these cases are the result of criminal prosecutions is of no avail to petitioners. The American system of jurisprudence without variance fixes the responsibility of law enforcement on the peace officer, prosecutor, attorney general, the courts and finally the public itself. The State of Arkansas is no different and it would not be of any benefit to cite and relate here the authority for these fundamental matters.

D. The Crime

These cases which are the concern of the application before this Court do not involve a delicate balancing of opposing constitutional rights. The foundation of these convictions rest rather on the universally recognized elementary principle of trespass. This Court aptly stated in *Martin* v. *Struthers*, 319 U.S. 141, at 147:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

The Arkansas Statute, §41-1433, *supra*, is merely a codification of the common law rule of trespass. See *Carpenter* v. *State*, 62 Ark. 286, 36 S.W. 900; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295.

In answer to the contention made by petitioners that the statute is discriminatory, the Arkansas Supreme Court observed that the law is not restricted to Negroes. Appendix to Petition, 8a, 9a.

Unquestionably, petitioners have made a persuasive argument that the application and enforcement of the statute has the result of fostering racial exclusionary practices. Respondent submits, however, that it is clear that such a disappointing result is purely incidental and subservient to the greater right of freedom of choice of the individual, not the majority or minority, which must be predominate of all other rights. If this were not so there could be no other rights, in practice or theory, for all rights would be nullified by the abolition of the one of choice since all other freedoms derived their life breath from choice alone.

E. Burden of Proof

Petitioners interject, for the first time in their petition that the burden of proof should have rested with the State of Arkansas to demonstrate there was no connection between so-called custom and state sanctions supporting customs. See Petition pp. 12-16.

There was neglect on the part of petitioners to raise this matter below so that the trial court and the Arkansas Supreme Court might have an opportunity to properly rule on the question. Local procedure in a criminal case requires that objection be made, exception taken, and the matter included in the motion for new trial. *Yarbrough* v. *State*, 206 Ark. 549, 176 S.W. 2d 702. Moreover, in a misdemeanor, only issues briefed can be properly considered. Rules of Ark. Sup. Court, Rule 11 (g). Reasonable procedural requirements created to facilitate the dispatch of justice have been honored by this Court. *Edelman* v. *California*, 344 U.S. 357; *Brown* v. *Allen*, 344 U.S. 443, 503.

Inasmuch as petitioners failed to comply with the long established rules of the courts of Arkansas, they cannot now be heard.

II

There are no Special Circumstances of Police Involvement to Constitute State Action

At Point II of the Petition, it is asserted that there were special circumstances involving the police which established the "State action" requirement which would place the case at bar within the purview of the Fourteenth Amendment. On the contrary, respondent submits that the record is totally void of any evidence, expressed or inferred, which would support such an argument.

The sole basis of petitioners' contention rests upon the testimony of Officer Baer who related at trial that while he was working in the vicinity of the Blass store, he observed and followed the group into Blass to a position where he saw them taking seats in the mezzanine restaurant area, and then notified headquarters. The officer further testified that he incidentally talked to a store employee while the demonstrators sat down (R.53). Just how, by conversing with an unknown employee, the officer could insure that a particular offense would be governed by a particular statute is not revealed or explained by petitioners. Rather than benefit this argument with even a speculative theory, petitioners are content to remain mute on this subject.

It must be noted that Officeer Baer's station was in a congested business district at the intersection of Main and Fourth Streets where Worthen Bank, one of Arkansas' largest financial institutions, Blass and Woolworth's are located (R.66). It would not seem unusual that a policeman would be on duty in that area at the time the offenses were committed. Moreover, the rather large group divided and entered separate entrances on Fourth Street and Main Street wearing badges. This would attract the attention of a less astute person, and in fact, succeeded in drawing a curious crowd (R.55,67). One of the petitioners had obviously gained some noteriety for the officer recognized him as a demonstrator (R.51).

It was not unreasonable that the situation demanded police scrutiny since petitioners did argue with store personnel, created a crowd, and refused to leave the dining area after they had been requested to do so (R.65). It most certainly would have been unreasonable for the police to have ignored the summons for assistance by the store. But petitioners would have the police to abandon

their responsibility and remain in the street. In other words petitioners insist that the police should have stayed out where they had been invited in and the petitioners should have been permitted to stay in even though they had been asked to leave. To say the least, such an argument is absurd and incomprehensible.

In conclusion, respondent agrees with the statement at page 18 of the petition that the situation presented in the instant cause "is a far cry from the mere neutral use of state machinery" found in *Lombard* v. *Louisiana, supra*, and *Peterson* v. *City of Greenville, supra.* In the absence of such proof, there can be no merit to the petitioners' submission of error.

CONCLUSION

The petitioners have entirely failed to substantiate one area of their petition to either logic or law. In fact, reason demands and the pronouncement of this Court governing the issues in controversy confirm, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 1, 1963

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 5

FRANK JAMES LUPPER, ET AL. ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 5

FRANK JAMES LUPPER, ET AL. *Petitioner*

v.

STATE OF ARKANSAS *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas styled as *Briggs et al* v. *State*, (Appendix of Petition) is reported at 236 Ark. 596, 367 S.W. 2d 750, and the opinion of that Court on petition for re-hearing (Appendix of Petition) is found at 236 Ark. 611, 376 S.W. 2d 760.

JURISDICTION

The jurisdictional requirement is adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Does the Civil Rights Act of 1964, enacted by the Congress of the United States, compel the reversal of these convictions?

II. Is there evidence of policy of any official organ of the State of Arkansas which requires segregation and would constitute "State action" under the Fourteenth Amendment to the constitution of the United States?

III. Does Act 14 offend any constitutional concept?

IV. Does enforcement of a criminal statute pertaining to trespass by criminal prosecution by the State of Arkansas constitute "State action" or is such otherwise violative of the Fourteenth Amendment to the Constitution of the United States?

V. Is the statute under which petitioners were convicted, Act 14, vague or indefinite

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 3, Article IV, Paragraph 2, and the Fourteenth Amendment to the Constitution of the United States.

FEDERAL STATUTES INVOLVED

This case involves the Civil Rights Act of 1964, Title II, 78 Stat. 243-246, quoted in the appendix of petitioners' brief and the federal saving statute, 1 U.S.C., Section 109, 61 Stat. 635, quoted at page 26 of petitioners' brief.

ARKANSAS STATUTES INVOLVED

The issue of this litigation is the constitutionality of Act 14, Acts of Arkansas, 1959, codified as Arkansas Statutes Annotated, § 41-1433 (1963 Supp.) which prohibits a person to remain on the premises of a business establishment after having been requested to leave by the owner or manager of the establishment and is quoted in full in petitioners' brief.

This case also involves the general saving statutes of Arkansas, codified as Arkansas Statutes Annotated, § 1-103 and 1-104, (1947), which are quoted in full in petitioners' brief.

STATEMENT

The petitioners, Frank J. Lupper, and Thomas B. Robinson, were prosecuted and convicted for a trespass which occurred at a privately owned business establishment in Little Rock, Arkansas. The petitioners were a part of a group of twelve to fifteen persons wearing identifying badges who entered Gus Blass & Company, a department store, between 11:30 A.M. and noon on April 13, 1960. A police officer who was working his beat at Fourth and Main Streets observed the group entering the store and recognized Robinson as a demonstrator. Several business establishments had previously suffered similar demonstrations during the preceeding weeks, and much notoriety of continuing demonstrations had been given by the sponsoring organizations. The group proceeded to a mezzanine tea room where they took chairs strategically placed themselves at the counter and at tables across the entrance. The tea room occupies a rather small area and caters mostly to women patrons, serving light lunches, congealed salads, and the like.

Within a few minutes, both petitioners, as well as some of the other remaining members of the group were courteously advised by store officials, the manager and assistant superintendent, that Blass reserved the right to refuse service to anyone and was not prepared to serve petitioners at that time. The petitioners were then requested to leave. No reference was made to race or discrimination. Although petitioners were not boisterous and were neatly dressed, they attempted to question and argue with the store personnel and refused to leave the premises.

After each of the petitioners had defied the requests to leave, the manager left the store and proceeded to Worthen Bank and Trust Company, located diagonally across the street from Blass, found two police officers and asked their assistance. The petitioners were apprehended on the first floor and readily admitted to the police officers the entire incident. These admissions were denied at the trial.

The petitioners were tried and convicted of the offense in the criminal division of the Little Rock Municipal Court. The convictions were appealed to the Pulaski Circuit Court where a trial *de novo* by jury resulted in verdicts of guilty. The Arkansas Supreme Court affirmed the convictions and subsequently denied the applications for rehearing.

The petitioners staunchly denied, during their testimony at trial, that they were peacefully protesting racial discrimination. It was intimated that pure happenstance found so many Negroes at the tea room for lunch on the same day. None of the petitioners admitted acquaintance with any of the others in the group. Their brief on

appeal to the Arkansas Supreme Court denied any concerted group operation. Now, it is finally admitted before this Court that the petitioners' actions were a part of a sit-in demonstration.

SUMMARY OF ARGUMENT

Perhaps this case has the dubious distinction of possessing the precise factual circumstances, absent the confusing aspects discovered in similar cases, which will permit this Court to determine the application of the Fourteenth Amendment to so called "sit-in" demonstrations in violation of state statutes governing trespass of private property. This litigation was not the result of a clever plan to snare unwary victims contrived by the State of Arkansas, law enforcement officials, or the manager of Blass Department Store. Nor was this incident a carefully devised test suit to determine the application and validity of a state statute. These petitioners were not youthful strangers seeking to satisfy a pain of appetite. Rather, these petitioners were local, mature, and sophisticated men attending a church and community supported college. These petitioners were well organized, well informed, but perhaps ill advised. They and their cohorts had been educated by experience as to the consequences of their unlawful acts. Their avowed and accomplished purpose was to create civil disobedience and violate existing State laws. They did so in an imprudent but effective manner. The fact that they and the others with them may have become precariously near to causing personal injury, property damage or both was of no concern or, at the most, incidental.

I

As a matter of law, the Civil Rights Act of 1964, does not operate to abate these prosecutions. That legislation is, by expressed terms, to operate in the future. There is no hint, much less authority, for retroactive application. Title II, § 2; *Hall* v. *Maryland*, 378 U.S. , 12 L. Ed. 2d 822. For whatever it is worth, the State of Arkansas has typical saving statutes which have been consistently interpreted. Ark. Stat. Ann. §§ 1-103 and 1-104 (1947); *Volmer* v. *State*, 34 Ark. 487 (1879). There has been no action taken by the General Assembly of Arkansas to enact a public accommodation law.

What is more important, there is no evidence whatever that a mezzanine tearoom which serves a luncheon and caters almost exclusively to women patrons would be governed by the act. Here, there is no question of transient guests or accommodation to a traveling public in the traditional innkeeper connotation. Title II (b) (2). Likewise, there is no evidence that petitioners were requested to leave the tearoom on account of race, color, religion, or national origin. Title II, § 201. (a).

In conclusion, the federal savings statute would dictate a continuing life to these prosecutions. 1 U. S. C § 109.

II

The record in this case is void of the traditional and recently recognized indicia of state action which would constitute a violation under the Fourteenth Amendment to the Constitution of the United States. There is a complete absence of evidence that there was a state statute, city ordinance, or a regulation of any governmental agency which would expressly or tacitly require segregation in restaurants. It is doubtful that the lack of evidence

may be accredited as an oversight. If anything, municipal and state government have established a free atmosphere where all of its citizens are unfettered to associate with whom they please. There is no evidence of past or present discriminatory practice in the business community or by Gus Blass & Company. Incidentally, the store manager was originally from Chicago and had been a resident of Arkansas for less than six months.

The history of Arkansas, especially in recent years, confirms that it is a government dedicated to neither integration nor segregation. A perusal of the few reported cases on the subject reveals that leading citizens, organizations, members and officers of city government including municipal police, have protected the rights of Negroes without disparity.

Finally, the procedural rules of the State of Arkansas would prohibit consideration of this matter by this Court. *Edelman* v. *California*, 344 U.S. 357.

III

Act 14 does not offend any constitutional concept, but on the contrary, compliments the constitutional rights of property and the individual. *Martin* v. *Struthers*, 319 U.S. 141. The constitutions of this Nation and the State of Arkansas are cognizant that the right of property is before and higher than any constitutional sanction. Ark. Const. Art. II, § 22. These broad and fundamental principles cannot be termed "narrow".

Although the facts in this case remove the tea room from the traditional innkeeper connotation, the common law did envision the right of a proprietor to eject those who may injure his business. Waterman, "A Treatise on the Law of Trespass." Vol. 1, § 174 (1875).

The authority supporting the right of Blass department store is overwhelming.

The petitioners were permitted to peacefully demonstrate briefly, but the store was not constitutionally required to furnish facilities for a public forum of marathon proportions. Cf. *Gibonev* v. *Empire Storage & Co.*, 336 U.S. 490.

IV

A. The mere aid of state criminal process to enforce Act 14 does not constitute state action in contravention of the Fourteenth Amendment. Ejection of petitioners was the choice of the manager. It is presumed that the officers acted in good faith. Ark. Stat. Ann. § 41-1435 (1963 Supp.); *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350. The action of the officers was not repugnant to equal protection.

The use of law enforcement officials and the courts do not amount to "State action". Cf. *Shelley* v. *Kraemer* 334 U.S. 1; *The Civil Rights Cases*, 109 U.S. 3.

B. The Fourteenth Amendment alone would not nullify the application of Act 14. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *United States* v. *Cruikshank*, 92 U.S. 542. Such an enlarged interpretation would apply with equal zeal and logic to a civil action for trespass. A property owner would thus be deprived of any judicial forum to seek and determine his remedies. The abstinence of jurist for the past nine decades to increase the application of the Amendment was both purposeful and meaningful. Neither the legislative history of the Amendment, nor the decisions of various courts support petitioners' contentions.

The Act under consideration cannot be considered to be vague or indefinite. Ark. Stat. Ann. § 41-1433 (1963 Supp.). It clearly and concisely declares what constitutes a criminal trespass in unequivocable terms and ordinary language. *Briggs, et al., v. State*, 236 Ark. 596, *supra*. There is absent the confusing aspect of forewarning found in *Bouie* v. *The City of Columbia*, 378 U.S. , 12 L. Ed. 2d 894. The requests to leave the premises were clear and unqualified and required immediate obeyance. *Crouch* v. *Ringer, et al.*, 188 P. 782. There was no deprivation by the private owners of a brief peaceful demonstration by petitioners and their group. There was a prolonged and defiant confrontation of the private perrogative of who shall compose the clientele of a business establishment.

ARGUMENT

I

The enactment of the Civil Rights Act of 1964 has no retroactive effect on these convictions.

The initial proposition presented by petitioners is that the recent enactment of the Civil Rights Act of 1964 requires abatement of these prosecutions as a matter of federal law. Of course, petitioners would be delighted to dispose of these cases in such a perfunctory manner and avoid the square meeting of the true crucial issue involved in this litigation. Perhaps this fact above all others demonstrates petitioners' ominous realization of the weakness of their contentions.

It will be decisively shown that petitioners cannot find comfort in the Civil Rights Act of 1964 to escape the bitter fruits of their crimes.

Presupposing that the Civil Rights Act of 1964 is constitutional, petitioners recite what could be the pertinent provisions of Title II of the Act popularly known as the accommodations section, and indulge in an *ad hominem* interpretation. It is concluded that, "It is clear . . . . " that Gus Blass & Company would be governed by the Act (p. 20 of Petitioners' Brief). This deduction ignores the expressed qualifications and definitions contained in the Act and is constructed without the benefit of a foundation of fact. What meager information can be gleaned from the record sustains only that the tea room occupied a small area on the mezzanine that serves a luncheon to patrons (R.41, 46). It is then gratutiously stated that "It is unthinkable that a State should be permitted to punish disobedience . . . " when Section 203 (c) of the Act now prohibits punishment (pp 21, 22 of Petitioners' Brief).

There is one critical fact distinguishing this case from all of the others presented to this Court. There is the total void of testimony or even the inference that petitioners were ordered to leave on account "of race, color, religion, or national origin." Title II, § 201 (a). Parenthetically, Act 14 not only makes no distinction of the race of the intruder, but declares the duty of peace officers to act without regard to race, sex or age. *Briggs et al* v. *State*, *supra*, 236 Ark. 596; § 3, No. 14 Acts of Ark. 1959, codified as Ark. Stat. Ann. § 41-1435 (1963 Supp.)

The sole reason expressed by the officials of Blass was that they were not prepared to give petitioners service at that time. This answer apparently satisfied petitioners trial attorneys for it was not pursued, but permitted to stand uncontradicted (R.42). The only hint of disagreeance was a supposition by Robinson on cross examination (R.66).

Respondent offers the challenge to discover one scintilla of evidence of racial discrimination in the record which was so tediously planned from the very staging of the demonstration to the presentation of this cause at this time.

As suggested previously, it may well have been the unusual phenomena, if it may be called that, of a large group of college men and their companions invading the tea room that caused the manager's reaction to refuse them service. Whatever the undisclosed reason, it is doubtful that the Civil Rights Act of 1964 could be successfully invoked under these circumstances.

With these factual issues settled, a concise study of the legal authority is now in order.

The petitioners, by a circuitous argument, urge that that federal provision defining the status of existing liabilities after repeal of a statute would not require a continuance of these prosecutions. 1 U.S.C. § 109. It hardly needs emphasis that a federal enactment supercedes a conflicting state statute. U.S. Const., Art. VI, § 2. It is expressly included in the Act. Title XI, § 1104. It is still impossible to reach petitioners' objective.

The vital question here is: Does the Civil Rights Act of 1964 retroactively invalidate these prosecutions? The answer is obviously in the negative. The petitioners initially admit this, but then by energetic efforts attempt to show otherwise. This is certainly laudable, but unavailing. The intent of Congress is clear and cannot be made the subject of wistful interpretation. The attention of the Court is invited to its most recent pronouncement on the subject. In *Bell* v. *Maryland*, 378 U.S. , 12 L. Ed. 2d 822, there was persuasive influence that the Maryland Court in *Beard* v. *State*, 74 Md. 130, 21 A. 709, had held that the use of the word "shall" rather than the word "is" disclosed that the obvious intention was not to interfere with past offences but merely to fix a penalty for future ones. It should suffice to note that the prohibitive provision, § 203 of Title II is perfaced with the phrase, "No person *shall* . . . " (Emphasis supplied.)

No more need be said, but petitioners' unfounded conclusions demand added response. The Arkansas saving statutes, Ark. Stat. Ann. §§ 1-103 and 1-104 (1947) have been interjected by petitioners into this case with some curiosity. It is certainly questionable that these statutes are applicable in this litigation. There is nothing in Act 14 which offends the Civil Rights Act of 1964. There

is no revision or amendment of Act 14 made imperative by the federal enactment. What is truly remarkable is that petitioners have not been so bold to urge that Act 14 could have conceivably been repealed by the Civil Rights Act of 1964. Assuredly, if the owner of an establishment identified by the Civil Rights Act of 1964 *were* to refuse an accommodation *on* the basis of race and instituted prosecution under the authority of Act 14, this would *now* result in an unconstitutional *application* of Act 14. None of the ingredients can be discerned from this record much less proven. The mere allegation of discrimination brought forth by petitioners' motions to dismiss (R.7-13) to the trial judge must be proven, not presumed. *Carter* v. *Texas*, 117 U.S. 442 (1900); *Tarrance* v. *Florida*, 188 U.S. 519 (1903). And petitioners have shunned this burden.

Conceding *arguendo* that the confusion concerning the operation of Arkansas saving provisions expressed by petitioners are real and not contrived, they are ready answers. The courts of Arkansas have voiced uniform interpretation of its saving statutes. *Volmer* v. *State*, 34 Ark. 487 (1879). This interpretation is consistent with the general rule. 1 Southerland Statutory Construction, 3d Ed., § 2047. There is no divergence from the rule in Arkansas where there is an amendment by partial re-enactment. *Lawyer* v. *Carpenter*, 80 Ark. 411, 97 S.W. 662 (1906).

At this point, respondent reaches an agreement, at least in part, with petitioners that a remand of these cases would not reap any valuable benefits. To reiterate, there is not even a remote conflict of Act 14 with the Civil Rights Act of 1964. Futile efforts should not be encouraged. *Fay* v. *Noia*, 372 U.S. 39 (1963).

II

Neither the State of Arkansas nor the City of Little Rock officially or otherwise requires segregation of races in restaurants.

It is petitioners' contention, set forth at Point II A of their brief, that the State of Arkansas, its citizens and its state and local governments are to be condemned for sanctioning racial discrimination and supporting racial segregation in the form of state law and policy. Support for this assertion is founded upon a comment of the Governor of Arkansas made in 1959 concerning segregated public schools and reference to certain statutes. Of course, one of petitioners' Negro attorneys was attending a state intergrated school as early as 1951, but no mention of this was made in the brief. Furthermore, there is no segregation on railroads, in waiting rooms or in the two race tracks existing in Arkansas. There are no street cars operating in this State. There are no segregated buses and those schools which may have not yet intergrated necessarily have the approval of the federal judiciary. Chain gangs are unknown. The division by race and sex of prisoners in penal institutitions is preferred by penologist.

Conspicious by absence is the failure of petitioners to show any license or franchise held by Blass from any governmental agency. Nor was there a showing that the State of Arkansas or any municipality has any provision, expressed or implied, which requires segregation in restaurants. Again, it is doubtful that this lack of evidence maybe accredited as an oversight by petitioners or their attorneys. No effort to solicit such testimony or otherwise introduce evidence was made simply because it was not available or true.

The history of Arkansas, especially in recent years, confirms that it is a government dedicated to neither segregation nor intergration. There exists a free atmosphere, not found in a "slave" state, where its citizens are unfettered one way or the other by State statutes and may associate with whom they please. To be sure, Little Rock experienced a dreadful controversy which was resolved, not only in the State and federal courts, but by the people of the community as well. There is no comparison, however, in the small number of disorderly persons involved in the school incident and the large group of demonstrators who invaded the downtown merchants. In fact, the crowds at Little Rock Central High School including curious bystanders are comparatively insignificant when related to the masses involved in the racial strife and unrest in New Jersey, Chicago, New York, Cicero and Philadelphia to mention but a few. How can petitioners say that the State and local government have promoted segregation? Only brief reference need be shown to disclose that leading citizens, organizations, members and officers of the city government including municipal police have protected the rights of Negroes and incurred the wrath of a few radicals. *Perry et al.* v. *State*, 232 Ark. 959, 342 S.W. 2d 95 (1961); *Lauderdale* v. *State*, 233 Ark. 96, 343 S.W. 2d 422 (1961). There were criminal prosecutions to the limit of the law by both the State and city government. Those demonstrators also claimed deprivation of their constitutional rights. *Lauderdale* v. *Smith*, 186 F. Supp. 958, (E.D. Ark. 1960); *Pritchard* v. *Downie*, 201 F. Supp. 893 (E.D. Ark. 1962), aff. 309 F. 2d 634 (8th Cir. 1962); *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961). The Supreme Court of Arkansas has impartially administered justice to those who attempted to make profit from emotions no matter the color of the litigants. *Monts* v. *State*, 233 Ark. 816, 349 S.W. 2d 350 (1961). Who

demands repentance for Arkansas? Respondent demands a contrary showing of atmosphere be made other than the general phrases of condemnation which have been illustrated to be fallacious.

The record in these cases is absolutely clear that there was no policy of racial discrimination by Gus Blass & Company or that it was aware of or concerned with the empty statutes which require segregation of races on chain gangs, street cars and the like. What is more, there is no evidence of racial discrimination in the rest of the business community.

Nothing worse can be said of the store manager. Again, the record is clear. Mr. Holt had held this position and had been a resident of Arkansas for less than six months (R.45). He was not the product of a "slave" state, but was from Chicago (R.45). It is certainly questionable that Mr. Holt had been indoctrinated to the "historic social prejudices of the South" in such a short period of time. If he was, his testimony most assuredly does not represent it. Consider also that there was no suggestion that Mr. Holt was a hostile witness. Cf. *Bell* v. *Maryland*, *supra*, Appendix II, concurring opinion, 84 S. Ct. at 1839. Surely this Court will not punish property owners in Arkansas and deny them the right to protect their business investment and livelihood simply for certain obsolete and aged enactments by the General Assembly. *Bell* v. *Maryland*, *supra*, dissenting opinion, 84 S. Ct. at 1873; cf. *McKibbin* v *Michigan Corp. & Securities Comm.*, 369 Mich. 69, 119 N.W. 2d 557 (1963).

But these matters just related are purely collateral and except for setting the record straight should not be persuasive in this litigation, for it matters not if Mr. Holt was personally prejudiced or that the corporation which he represented was prejudiced to the persons he

had requested to leave the premises. It matters not that it was the policy or the belief of the manager or stockholders that more profit could be made by operating the department store with the facilities of a tearoom for the convenience of luncheons on the premises for women shoppers on a segregated basis.

There are some who condemn a capitalist economic society, much more the form of corporate enterprise. To this day the business of making a reasonable profit for labor expended or services performed has not been deplored in this country but is ordinarily commendable. The profession of law is perhaps one of the highest callings. Still some judges, most lawyers and with few exceptions, all law clerks expect some remuneration. This is not considered materialism or greed. If it were otherwise, there would be little opportunity to secure those men and women of great wisdom, intellect and ability to consider the most weighty and burdensome of legal problems. It is a virtue that an individual, whether a day laborer or an absentee stockholder, makes a reasonable living, supports his family and nurtures his children spiritually and educationally. These goals, above all others, have attributed to the success of this country, now the mightest nation in the world. Business judgment, whether based on prejudice, exclusiveness, economy or otherwise, should and must be recognized as a legitimate and valuable constitutional right which merits protection by this Court. *Terminal Taxicab Company* v. *Kutz*, 241 U.S. 252; *Marrone* v. *Washington Jockey Club*, 227 U.S. 633.

Finally, petitioners neglected to raise this issue below so that the trial court and the Arkansas Supreme Court might have an opportunity to properly rule on the question. Local procedure in a criminal case requires that objection be made, exception taken, and the matter in-

cluded in the motion for new trial. *Yarbrough* v. *State*, 206 Ark. 549, 176 S.W. 2d 702. Moreover, in a misdemeanor, only issues briefed can be properly considered. *Fields* v. *State*, 219 Ark. 373, 242 S.W. 2d 629; Rules of Ark. Sup. Court, Rule 11 (g). Reasonable procedural requirements created to facilitate the dispatch of justice and to assure finality of litigation have been honored by this Court. *Edelman* v. *California*, 344 U.S. 357; *Brown* v. *Allen*, 344 U.S. 443, 503. Inasmuch as petitioners have failed to comply with the long established rules of the courts of Arkansas, they cannot now interject this matter for consideration by this Court.

III

Act 14 is consistent with all constitutional concepts.

It cannot be successful argued that Act 14 is *per se* violative of the Fourteenth Amendment or is repugnant in any way to the Constitution of the United States. On the contrary, Act 14 is consistent with and lends to the inalienable guaranty of an individual to select whom he desires to associate with in his business and social life.

The State of Arkansas has over thirty statutes prohibiting trespass in one form or another. Although Act 14 is one of the most recent, it does not abbrogate the common law but is rather, a codification of the prevailing rule in this country. Act 14 is also in harmony with statutes of numerous other states. This most germaine and expressive language is found in *Martin* v. *Struthers*, 319 U.S. 141, at 147:

> "Traditionally, the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes

> exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Therefore, Act 14 complements rather than detracts from the supreme law of the land.

Gratefully, respondent is not compelled to exhaustively search, vainly interpret, and ingeniously create authority and reason to sustain its position. The firm foundation supporting Act 14 is readily available, clearly stated, and well established. The authorities are almost too numerous and settled to permit or require reference.

Consider, for a moment, the following excerpts from the Constitution of Arkansas standing bare without the necessity of a clothing of judicial enlargement:

> "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and property, of acquiring, possessing and protecting property . . . " (Article II, Section 2).

> ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law . . . " (Article II, Section 8).

> "The right of property is before and higher than any constitutional sanctions; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." (Article II, Section 22).

Almost identical provisions are found in the Constitution of the United States:

> ". . . nor shall private property be taken for public use, without just compensation." (Amendment 5).

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . ." (Amendment 14, Section 1).

Respondent submits that these are not hollow phrases and no amount of strained semantics can alter these broad concepts to a "narrow" principle.

If accolades and praises are sung for our founding fathers and the Fourteenth Amendment, let no discordant note fall on the individual and his property. Hark the individual! Not the minority, nor the majority, the demonstrator, the organization, nor even the assertion of pseudo rights which have been born in the minds of evil men for the sole purpose to injure and destroy others and their property.

In similar cases which have recently been brought before this Court, much has been said of the traditional innkeeper's obligation to accept all guests. Such a comparison here must necessarily fail. First, the facility where petitioners sought service, previously described as a tea room on the mezzanine of a department store located in downtown Little Rock, is clearly distinguishable from the envisioned coach road house or inn. Fourth and Main Streets is not the path of a weary traveler, for state and national highway systems are remotely distant. Railway facilities, bus terminals, and commercial aircraft are not even located in the general vicinity of the store. It is not reasonable to assume that a person would hazard the congested business district traffic and unavailable parking to be a transient guest. Most assuredly, this was not the goal that Blackstone and other ancient legal philosophers intended to secure for the traveling public.

Second, even those eminent authors and jurists, while considering the obligations of the innkeeper did envision the rights of the proprietor now expressly secured by the terms of Act 14. It is stated by Waterman in "A Treatise on the Law of Trespass" (1875) at Section 174, that an innkeeper is not obligated to make his house a common receptacle for all comers whatever may be their character or condition. At Section 175, he states:

> "As an innkeeper is bound to admit travelers under certain limitations. . . . There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guest, the same lawful purpose, comes in a like suitable condition and with as proper a demeanor, any more than he has the right to admit one traveler and exclude another merely because it is his pleasure. *If one came to injure the house, or if his business operated directly as an injury, that would present a different question.* Perhaps there may be cases in which an innkeeper may have a right to exclude all but travelers and those who have been sent for by them." (Emphasis added.)

This Court consistent with those well established principles has held that the public does not mean everybody all of the time. *Peck* v. *Tribune Co.* 214 U.S. 185. An ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes. *German Alliance Insurance Co.* v. *Kansas*, 233 U.S. 389. In *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N.E. 2d 541, 14 ALR 2d 133, cert. den. 339 U.S. 981, it was held that a corporation organized under the New York law to provide low cost housing may constitutionally select its tenants with the right to reject on account of race, color, or religion.

To go one step further, the fact that the private owner may be required to secure a license from the State in order to operate, does not alone prohibit discrimination by the owner, nor does it convert the private facility into a public one. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir.); *Slack* v. *Atlantic White Tower Systems, Inc.*, 181 F. Supp. 124, aff. 284 F. 2d 746; *Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, aff. 183 F. 2d 440 (8th Cir.); *Griffin* v. *Collins*, 187 F. Supp. 149; *Tamelleo* v. *New Hampshire Jockey Club, Inc.*, 163 A. 2d 10 (N.H.); *McKibbin* v. *Michigan Corp. & Securities Commission*, 119 N.W. 2d 557 (Mich.); *Madden* v. *Queens County Jockey Club*, 72 N.E. 2d 697 (N.Y.), cert. den. 332 U.S. 761; *Terrell Wells Swimming Pool* v. *Rodriguez*, 182 S.W. 2d 824 (Texas); *Younger* v. *Judah*, 19 S.W. 2d 109 (Mo.); *Gaff* v. *Savage*, 210 P. 374 (Wash.); *De La Ysla* v. *Public Theatres Corporation*, 26 P. 2d 818 (Utah); *Horn* v. *Illinois Central Railroad*, 64 N.E. 2d 574 (Ill.); *Coleman* v. *Middlestatt*, 305 P. 2d 1020 (Calif.); *Fletcher* v. *Coney Island*, 136 N.E. 2d 344 (Ohio); *Alpaugh* v. *Wolverton*, 36 S.E. 2d 906 (Vir.); *Grenfeld* v. *Maryland Jockey Club*, 109 Md. 96, 57 A. 2d 335; *Good Citizens Assoc.* v. *Board*, 217 Md. 129, 141 A. 2d, 744; *Drew* v. *State*, 224 Md. 186, 167 A. 2d 331 *Garfine* v. *Monmouth Park Jockey Club*, 148 A. 2d 1 (N.J.); *State* v. *Arent*, 148 S.E. 2d 47 (N.C.), vacated and remanded on other grounds, 373 U.S. 375. There are, of course, other cases. *Western Turf Association* v. *Greenberg*, 204 U.S. 359; *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589; *Brown* v. *Meyer Sanitary Milk Company*, 150 Kan. 931, 96 P. 2d 651; *Brookside-Pratt Mining Co.* v. *Booth*, 106 So. 240 (Ala.), and many more.

The facts in the case at bar are no less compelling than the decisions just cited. With the hope of not being too redundant, respondent again submits that the manager of Blass Department Store had ample valid reason to refuse service in the mezzanine tea room "at that time" to the large group of badge wearing demonstrators. Their mere presence had already drawn a curious crowd (R.47). It was the store's busiest time of the day (R.47). And most important, the rejection of service was the manager's private prerogative.

The crucial and delicate balance of rights has been demonstrated not to be unique. It is comforting to have the knowledge that this Court and the highest courts of the several states have resolved the problem with little effort and amazing consistency. What is truly remarkable now is that there are still some expressions of concern of the correctness and validity of the decisions even in the face of such abundant authority. Before this topic is concluded, it is mandatory to note that the cases relied upon are not peculiar to any one area of our nation designated by some as "slave" states, but enjoy a uniform pattern throughout the several states.

Now, the issue of peaceful demonstrations can be readily met. It is apparent from the record developed in the trial court that to a point, the purpose of the petitioners and their group was fulfilled. No crime was committed by petitioners until they refused to leave the premises after they were ordered to do so by the store manager. It should be obvious that the officials of Blass were not desirous and should not constitutionally be required to furnish facilities for a public forum of marathon proportions. Cf. *Gibonev* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *Marsh* v. *Alabama*, 326 U.S. 501.

IV

The enforcement of Act Fourteen by typical criminal process does not constitute "State Action" and is not otherwise violative of the Fourteenth Amendment.

A. The Mere Aid of State Criminal Process Is Incidental And Does Not Constitute "State Action."

The fact that these cases are the result of criminal prosecutions is of no avail to petitioners. The American system of jurisprudence, without variance, fixes the responsibility of law enforcement on the peace officer, prosecutor, attorney general, the courts, and finally, the public itself. The State of Arkansas is no different and it would not be of any benefit to cite and relate the authorities voicing this fundamental duty. Incipiently, it is imperative to note the case at bar is void of an implementing city ordinance (*Peterson et al.* v. *City of Greenville*, 373 U.S. 244) the announcement of public officials prohibiting demonstrations (*Lombard* v. *Louisiana*, 373 U.S. 267), public property (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715) or state agency regulations (*Robinson* v. *Florida*, 378 U.S. , 12 L.Ed. 2d 711.)

In the instant case, the police officers responded to the plea for assistance from a manager of a privately owned department store. It was their statutory obligation to lend assistance without regard to race, sex, or age. Ark. Stat. Ann. §41-1435 (1963 Supp.), *supra*. In absence of the contrary, good faith of the police officers in the administration of their duties is presumed. *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350; *Barbier* v. *Connolly*, 113 U.S. 27. It cannot be validly argued that the use of police enforcement was a denial of equal protection of the law of petitioners' rights because no such evidence was introduced and, as a practical matter,

the officers did not participate in the manager's decision. *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S.W. 2d 679, cert. den. 352 U.S. 894; *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37; *Snowden v. Hughes*, 321 U.S. 1. The quantum of proof required of petitioners would be that the officers knowingly failed to perform their duties. *Hickinbotham v. State*, 227 Ark. 1032, 303 S.W. 2d 565.

Petitioners wield a double edged sword. They urge that the use of Act 14 is repugnant to the equality clause. This contention too fails, for such a claim "cannot be supported by mere speculation or conjecture." *Hodge Drive-It Yourself Company v. Cincinnati*, 284 U.S. 335, 338.

As a matter of fact, this record sustains a conscientious effort on the part of the law enforcement officials to be fair, impartial, and perform their sworn oaths. Of the thirteen original defendants in the cases consolidated for appeal, the Arkansas Supreme Court only affirmed two of the convictions. *Briggs et al. v. State*, *supra*, 236 Ark. 595 notwithstanding there was ample evidence to sustain the other charges. *Briggs et al. v. State*, dissenting opinion, 236 Ark. 607.

Petitioners actually seek to elevate their "freedoms" to a dual system of justice. In other words, they would have this Court declare Act 14 inapplicable to Negroes but applicable to Caucasians and other races. Conceivably, the same argument could just as forcibly be put to any other crime involving the property of another. Thus, petitioners as Negroes do not in fact ask this Court for equal justice, but for preferential treatment despite justice.

How some would seek, can state action be found in deprecation of inherent rights concerning criminal procedure which offends the Fourteenth Amendment? The answer to such inquiry is the question. A coerced confession tried without the benefit of counsel, and discrimination in the selection of a jury are fundamental violations of due process of law. These doctrines have been espoused hundreds of times by this Court. Others may feel how a tea room should be regulated, but not a one can ignore the fact that the tea room in this case affects interstate commerce and is subject to Congressional monopoly. On the basis of many decisions, it is argued that the law affects interstate commerce and does not tread on due process of law nor does it carry interstate commerce. Cf. *Rountree* v. *Virginia*, 364 U.S. 101. It is no more of a commonly shared belief that a mere [illegible] have recognized an increasing willingness to find State action (*McAuley* v. *Wallace Cotton & Securities Corp.*, 36 Mich. 67, 139 N.W. 2d 337 at 360), but to extend the application of the Fourteenth Amendment and the case at bar would be phenomenal to say the least.

strictive covenant rather than the Negro plaintiff's property right. Brief for Respondent, p. 6, *Barr et al. v. City of Columbia*, 378 U.S. , 12 L. Ed. 2d 766. The principle and undisputed reason for the result reached in *Shelley* was the property rights protected by the Civil Rights Acts of 1866 and 1870. Hence, the unavoidable decision of *Buchanan v. Warley*, 245 U.S. 60. Since *Shelley* and like cases draw their very life from the early civil rights legislation, it is helpful to review decisions made when the legislation was still fresh in the minds of the Court. In *The Civil Rights Cases*, 109 U.S. 3, rendered in 1883 this Court cautioned:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, custom or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual . . ."

With this language foremost, a portion of a sentence from *Shelley v. Kraemer* is worth noting:

> ". . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Earlier, in *United States v. Cruikshank*, 92 U.S. 542, it was stated at 554:

> "Its (Fourteenth Amendment) sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to

> your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of the citizens of other states within your jurisdiction. *Slaughterhouse Cases*, 16 Wall 36, 77." (Emphasis added.)

This interpretation has not been modified. *Colvin v. Hardyman*, 341 U.S. 651; *District of Columbia v. Thompson Co.*, 346 U.S. 100; *Williams v. Yellow Cab Co.*, (3 Cir.), 200 F. 2d 302, cert. den.; *Dargan v. Yellow Cab Co.*, 346 U.S. 840.

Even in the most recent pronouncements [illegible], which have undisputedly enlarged the doctrine of state action, great care has been taken to respect and restrict the operation of the Fourteenth Amendment. *Avent v. North Carolina*, 373 U.S. 375; *Gober v. The City of Birmingham*, 373 U.S. 277; *Lombard v. Louisiana*, 373 U.S. 267; *Peterson v. City of Greenville*, 373 U.S. 244.

Stare decisis is the historical cornerstone of our system of jurisprudence and that time honored doctrine should not now be sacrificed on the alter of a ficticious right to invade private property.

B. The Fourteenth Amendment Alone Does Not Prohibit These Prosecutions.

The brief of petitioners not only attempts to show state action by a criminal prosecution of a trespass statute, but delves even deeper. The petitioners would not only deny a property owner police protection, but would apply the same theory with equal zeal to a civil action for trespass. Thus, a property owner, failing to satisfy the whims of an individual or a group, would not only be left without police protection, but would

have no judicial forum to find and declare his remedies as well. Unquestionably, such a concoction for the protection of the rights of a law violator runs afoul of and thwarts the constitutional rights of others. Again, rises the sinister creation of a dual system of law providing for absolute immunity of Negroes and attendant deprivation of rights of storeowners while subjecting all others to the full force of criminal and civil remedies.

From whence came such a proposition? Where did it evolve? What else would its malignant growth encompass?

Amazingly, petitioners would employ the Fourteenth Amendment to reek such devastation. The argument, simply put, is that the Amendment alone and standing independent of State action would nullify the application of a trespass statute used to deny petitioners service in a restaurant. To foster and engender substance in support of this proposition, some would rely on that famous document which gave birth to this Nation. They would reason that our forefathers by the Declaration of Independence contemplated that Negroes had a right to be served in any restaurant. They would ignore that the authors of the Declaration and the Constitution of the United States held bonded servants and owned slaves. The drafters sought to protect their vested rights. U.S. Const., Art IV, Sec. 2 Par. 3; Art. I, Sec. 2, Par. 3. In answer, it might be said that those provisions were nullified by the adoption of Amendment Fourteen in 1868. It is remarkable, to say the least, that this unique application of the Amendment has only now come sharply into focus notwithstanding that it has existed for almost a century. Jurists have not been blinded for more than nine decades and simply failed to perceive what some would presently read into the Amendment. The fore-

sight and wisdom of those who have interpreted the Fourteenth Amendment were not prohibited by some mystic power from invoking this newly conceived application. The abstinence was both purposeful and meaningful. The words of the Amendment have not changed any more than the rights of those who have lived under it. The Fourteenth Amendment absent state action was uncontrolling in such situations in the past and has no authority today.

Surely the authors of the Fourteenth Amendment did not have such a broad purpose in mind. The legislative history of the Fourteenth Amendment, while misleading to some, does not seem to produce a greater application than the Courts have given it in the past. In this respect, respondent would beg indulgence and permission to rely upon Point IV of the dissenting opinion of Mr. Justice Black rendered in *Bell* v. *Maryland*, *supra*, 84 S. Ct. at 1873—1878.

The cases interpreting and applying the Amendment have not only failed to increase the scope of the Amendment, but have expressly limited it. The courts have held that the Fourteenth Amendment created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws. Thus, Mr. Justice Bradley, in *The Civil Rights Cases*, 109 U.S. 3, *supra*, after quoting the first section of the Fourteenth Amendment, said:

> "It is *state action* of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." (Emphasis Supplied).

In *United States* v. *Harris*, 106 U.S. 629, the Court quoting from *United States* v. *Cruikshank*, 92 U.S. 542 *supra*, said:

> "The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another."

Notice should also be taken of the dissenting opinion of Mr. Justice Black in *Bell* v. *Maryland*, *supra*, 84 S. Ct. at 1868, noting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, *supra*, where these apt words are found:

> "This well-established interpretation of Section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion, forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

Unless respondent has misinterpreted even the most recent opinions of this Court of the past two years, the traditional concept of the application of the Fourteenth Amendment to state action still prevails.

It is submitted that benefits that might be derived by the proposed innovation are more imagined than real, and in any event would destroy more freedoms and rights than it would create. Of lessor importance, hundreds of cases would be reversed and their well reasoned opinions would be replaced by judicial fiat.

V

Act 14 is not Vague or Indefinite.

The third principle topic discussed in petitioners' brief is that the convictions violated due process of law because Act 14 is vague and indefinite. This Court has, on many occasions, set forth the standards and guides to be used to reach and determine if a statute is clear and understandable. *Lanzetta et al* v. *New Jersey*, 306 U.S. 451; *Screws, et al* v. *United States*, 325 U.S. 91 (1945). No useful purpose would be served to reiterate that criteria here.

The crux of petitioners' argument in the Arkansas case appears to be a condemnation of the word "premises." To assure proper connotation, respondent deems it beneficial to quote the enactment. Now codified as Ark. Stat. Ann. §41-1433 (1963 Supp.) Act 14 provides:

> "Any person who after having entered the business premises of any other person, firm, or corporation other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment. [Acts 1959, No. 14, §1 p. 29.]"

There is no question that the act clearly, and concisely declares what constitutes a criminal trespass in unequivocal terms and ordinary language. The Supreme Court of Arkansas, in its decision, had no difficulty resolving the contention of vagueness made by petitioners below. *Briggs et al* v. *State*, *supra*, 236 Ark. at 602. There, it was stated:

> "The Act clearly, specifically, and definitely makes the failure to leave the business premises of another, upon request of the owner or manager, a misdemeanor."

The Arkansas Court was not required to indulge in interpretation, but simply and easily paraphrased the statute.

An effort is made by petitioners to parallel Act 14 with the recent decision of *Bouie* v. *City of Columbia*, 378 U.S. , 12 L. Ed. 2d 894 (1964). However, a perusal of that case reveals no reasonable analogy. First and primary, Act 14 requires no forewarning as did the South Carolina trespass statute considered in *Bouie*. Act 14 has but two essential elements: (1) Refusal to depart from the business premises of another; (2) Upon request of the owner or manager of the Business establishment. Cf. *Wright et al* v. *Georgia*, 373 U.S. 284 (1963). This court has approved more indefinate language. *United States* v. *Alford*, 274 U.S. 264 (1927). Moreover, as previously shown, Act 14 truly amounts to no more than a codification of the common law of the owner's inherent right to eject persons. Even if the basis of Act 14 was not the common law, who would argue that abrogation by statute is improper?

Aside from the legal authority, the factual aspects of this case are even more compelling. Act 14 was not a legal snare contrived by the State of Arkansas, police officials, or Blass to trap petitioners in criminal trespass. One previous demonstration involving a group of more than fifty demonstrators had been staged almost a month earlier. The necessity of counsel had obviously been foreseen, legal ramifications anticipated, and preparations completed. It is more than happenstance that the same eminent counsel appearing here have represented

other demonstrators all over the United States. One petitioner, Robinson, had gained such notoriety that he was recognized immediately as he entered Blass store with a group of demonstrators, by a patrolman. It is agreed that the Constitution is not color blind and most assuredly, those who interpret it should not feign inability to perceive the dedicated, organized, and concerted effort of petitioners to violate and bring focus on a particular criminal act.

It would be incredible to conclude that petitioners were ingenously ignorant of their status and the law. As in *Bell* v. *Maryland* and many other cases recently reviewed by this Court, showing an organized effort of national scope, petitioners purposely "courted arrest." 378 U.S. , 84 S. Ct. at 1868, dissenting opinion.

The brief for petitioners on this point, cleverly and in good taste humor, has created hypothetical situations to point up ridiculous applications of Act 14 to "leave the pickles" or "the ribbon counter." (pp. 75, 76 of Petitioners' Brief) Fortunately, the glibness of the brief cannot alter the language of Act 14 nor the conclusive record made in this case. Although petitioners denied their admissions, police officers testified that both petitioners acknowledged that they had refused to leave the premises as requested by the manager (R.28,33,40). The petitioners devote a paragraph with three references to the record to illustrate that they were only asked to leave the lunch counter or tables but the record is replete with testimony to the end that petitioners were, in the words of the statute, requested to leave the premises (R.28,30, 33,40,42,44). At least some of the group understood the request and left the business premises, for only the petitioners were discovered after the store manager had returned to the store with the police officers.

Finally, petitioners argue that a refusal to leave the premises for two and one-half minutes has utterly "ludicrous results." The reference to time, is at the least, misleading. It is true that there is some disparity of the time involved. One of the petitioners fixes his entrance into Blass at 11:35 a.m. (R.54,60). The store manager substantiated this to some degree (R.47). First, Mr. Trianfonte was notified, then observed the disturbance of the group talked with them, and shortly notified Mr. Holt, the store manager (R.42, 44). The store manager then came to the mezzanine, where they both undertook to encourage the group to leave without a disturbance because they were unprepared to serve them at that time (R.50). After having a similar conversation with several of the demonstrators, Mr. Holt was required to leave the store to find police officers across the street at Worthen Bank & Trust Company (R.46, 47). It was not until their return to Blass that petitioners were apprehended and questioned. It is thus readily ascertainable that there had been a lapse of about thirty minutes from the commencement of the demonstration to its conclusion (R. 30). There had at least been a lapse of about five minutes while Mr. Holt was gone (R.47). Surely, petitioners will admit that they remained on the mezzanine in defiance of lawful order of the manager for a considerable time and apparently did not intend to leave the store immediately. At least, one court has held that demand to leave requires immediate obeyance. *Crouch v. Ringer, et al.* 188 P. 782 (1920), 9 ALR 374. Surely, the circumstances here would not dictate otherwise. It must be remembered, that had petitioners made any reasonable effort to comply with the request of the store manager, they would have exercised their peaceful persuasion demonstration, would not have been arrested, and would not be before this Court at this time.

CONCLUSION

The consideration of these two prosecutions for the crime of trespass should not turn on what some may consider a national moral issue. The Civil Rights Act of 1964 has to a significant extent resolved this. The issue here is of an overriding fundamental nature which could sever the very roots of this country from the nutrition of individual choice and use of private property.

The pressures are great; the burden is heavy. This Nation of individuals awaits a decision. A determination adverse to respondent would be a calamitous breach of what our forefathers conceived as an impregnable fortress of individual freedoms. Such a mandate would provide a smooth avenue to the systematic destruction of all the scared rights heretofore considered to be inalienable.

These are only some of the consequences of absolving petitioners of their premediated acts. Nothing need be said of what new tact petitioners will take if given the blessing and immunity of a favorable decision.

Respondent prayerfully urges that the contentions of petitioners be rejected and the lower court affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1964

No. 5

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v.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR REHEARING

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PETITION FOR REHEARING

The respondent, by its counsel, respectfully requests that a rehearing be granted in this cause. In the alternative, respondent urges that the convictions of petitioners be remanded to either the state court or the federal district court for hearing and determination of crucial facts which are pertinent to the application of Title II of the Civil Rights Act of 1964. In any event, respondent asks that the opinion of the court be clarified to afford respondent and other jurisdictions adequate guides to properly implement the decision rendered.

The following topics are offered by respondent in support of its prayers for relief.

I

Abatement of State Prosecutions

The conclusion of the majority of the Court was in essence that the Civil Rights Act of 1964 abates the prosecutions and convictions of participants of "sit in" demonstrations which had not been finally adjucicated.

It is not necessary to dwell on this point for its weakness has been adequately and convincingly voiced by the dissenting opinions. It should suffice to state that the holding of the majority was a violent departure from settled authority.

One matter does deserve special comment. The majority speaks of the Civil Rights Act as creating a right or substituting a right for a crime. The Act itself contains no such allusions. It merely prohibits punishment of a person who seeks to secure goods and services. See Title II, Sec 201 (a) and Sec. 203. On the other hand, the Arkansas Statute, Act 14, does not make a request for service a crime, but only condemns the refusal of a person to leave the premises upon the order of the manager of the store. Hence, there can be no conflict between the two enactments.

The majority's construction of the Civil Rights Act condoning demonstration by sitting, lying or otherwise, effectively destroys the prime objective and the high motives of the Act. The opinion constitutes an invitation to violence without punishment, or lawlessness with law.

What is truly ironical, is that a plain reading of the Act would offer a ready defense to persons now genuinely seeking service who is made the victim of ambitious prosecution and also furnishes a judicial means to vindicate the wrong.

Finally, there is a legitimate public interest in any unlawful conduct, past or future. Lawlessness can not be so lightly entertained in any sphere. The judicary should not indulge in the wisdom or expediency of legislation. Abandonment of such fundamental principles is not dictated by the circumstances present in this litigation.

II

Application of the Civil Rights Act

Aside from entanglements of interpretation of the law, this case presents pecular factual problems. The description of the incident arising in Arkansas set out in the opinion of the Court was eminently fair.

Conceding *arguendo* that the Civil Rights Act will abate some prosecutions, two important questions still remain to be answered. First: Is the tearoom located in Blass an establishment covered by Title II? Second: If so, were petitioners requested to leave on account "of race, color, religion or national origin?"

As to the former, there is probably no genuine controversy. During oral argument this was the honest appraisal of counsel for respondent based upon casual knowledge of the activities of a large department store. Purely speaking, it seems unreasonable to adversely adjudicate such a significant legal proposition in what cannot be fashioned even as an *ex parte* conclusion. All too suddenly it would appear that Blass had involuntarily and unknowingly become a real party in interest.

It should be interjected at this juncture that while it is true respondent resisted an order of remand in its Brief and during oral argument, it was because respondent

believed the Arkansas law on abatement was clear (Respondent's Brief, p.13) and that while the department store might be covered, no concession was intended to include refusal of service on the basis of petitioners' race.

Notwithstanding these several considerations, the aspect of coverage alone may not justify a remand for hearing.

The second question presents a more serious and difficult venture. There is not merely a void of evidence of refusal of service because of race. The evidence will only sustain a conclusion contrary to that reached by the Court.

Coupling both questions, each gains stature and prominence. A remand for hearing can result in no harm. The conclusion may very well be the same, but it will be founded upon evidence. If a different result is justified, none but the unfaithfull will disparage it.

III

Implementation of the Decision as to Existing and Future Cases

At the commencement of the consolidated oral argument, a comment was made that approximately 3,000 prosecutions involving demonstrators were at some stage of litigation in the several states. The only case then heard by the Arkansas Supreme Court was the case at bar and none were pending. Since this opinion was announced, attention has been brought to several prosecutions in both the municipal and circuit courts which have been suspended awaiting disposition of this cause by this Court.

Should respondent's separate prayers for reconsideration or remand be denied, there still exists a grave question as to the proper disposition of the sit in cases in Arkansas and the several other states. Moreover, since the Court deferred ruling on the validity of trespass statutes *per se*, undoubtedly future controversy will arise. In either instance, the inferior State and Federal courts do not have the benefit of any guides.

Not only judges but other officers of the judiciary, as well as responsible State officials have the obligation of advising legislative bodies, business men and law enforcement agencies.

Thus, much amplification is needed to afford timely resolution of pending cases but also to assure correct future judicial involvement.

Respondent would urge that this Court state, that in the event the Civil Rights Act of 1964 is invoked as a defense to a state prosecution, if the accused would have the burden of proving by a preponderance of the evidence the coverage of the establishment by the Act and refusal of service on the ground of race, color, or national origin.

Further, this Court should determine it the questions of coverage and the refusal of service should be a matter of law or fact.

Undoubtedly, other issues will arise. All cannot be anticipated. These basic matters have already been brought sharply to focus and are of such consequence to be deemed absolutely essential.

CONCLUSION

Much consideration has been given the decision of the Court entered in this cause and the prayers set forth in this petition.

Pursuant to the Rule 58 of the Court, respondent has endeavored to briefly and distinctly state support for its contentions.

It is respondent's sincere belief that the majority of the Court has grievously erred.

Much benefit would be gained by permitting this cause to be remanded to an appropriate hearing and fact finding tribunal. All interested parties could then be adequately heard and proper proof submitted on areas not anticipated or known at the time of petitioners' original trial. Although piecemeal trials should not be encouraged, justice should be served as expeditiously as possible. e.g. *Jackson v. Denno*, 378 U.S. 368.

It is recognized that decisions of courts do not and should not attempt to anticipate or speculate on special problems which may be created. But there are practical problems of mechanic of implementation. If the circumstances of this case are " . . . a possibly unique phenomenon . . . ." *Bell v. Maryland*, 378 U.S. at p. 235, then

the import of this decision and its far reaching effect perhaps likewise requires special instructions. cf. *Sain* v. *Townsend*, 372 U.S. 293, *Fay* v. *Noia*, 372 U.S. 391.

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CERTIFICATE

I, Jack L. Lessenberry, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Jack L. Lessenberry